LIBRARY OF CONGRESS
1800

THE

UNITED STATES AND THE STATES

UNDER THE CONSTITUTION.

BY

C. STUART PATTERSON.

SECOND EDITION,

WITH NOTES AND REFERENCES TO

ADDITIONAL AUTHORITIES,

BY

ROBERT P. REEDER,

OF THE PHILADELPHIA BAR.

PHILADELPHIA:

T. & J. W. JOHNSON & CO.

1904.

JK 314
.P3
1904

THE LIBRARY OF CONGRESS
Two Copies Received
OCT 31 1904
Copyright Entry
Oct. 27. 1904
CLASS A XXc. No.
100100
COPY A.

Copyright, 1904,
By C. Stuart Patterson and Robert P. Reeder.

3L 9/3/09

To

EDWARD PATTERSON, LL. D.,

A Justice of the Appellate Division

of the

Supreme Court of New York,

I affectionately dedicate this book.

C. Stuart Patterson.

PREFACE.

While this is a second edition of a book published in 1888, it is to a great extent a new book. The text has been not only revised, but largely rewritten. The text is exclusively my work, but the references in the notes to the later cases are entirely the work of Mr. Reeder, who has prepared the table of cases and the index, and who has kindly read all the proofs.

My hearty acknowledgments are due to Mr. Reeder for the valuable assistance which he has rendered to me, and also for very many pertinent suggestions which I have adopted, and which have given to the text much of any value it may have.

C. S. P.

Philadelphia,
1st Oct., 1904.

CONTENTS.

CHAPTER I.

THE RELATION OF THE STATES AND OF THE TERRITORIES TO THE UNITED STATES AND TO EACH OTHER.

1. The sanction of the Constitution.
2. The indissolubility of the Union.
3. The autonomy of the states.
4. The delegated character and limited powers of the government of the United States.
5. The federal supremacy.
6. The restraints upon the states.
7. The force and effect of the preamble to the Constitution.
8. The territories.

CHAPTER II.

THE IMPLIED POWERS.

9. The necessity of their existence.
10. Their constitutional recognition.
11. The test of the relation of the means to the end.
12. Illustrations of the exercise of the implied powers.
13. The legal tender question.

CHAPTER III.

TAXATION.

14. Taxation defined and limited.
15. Taxation by the United States.
16. Restrictions upon federal taxation.
17. Taxation of exports.
18. Direct taxation.
19. Requirement of uniformity.
20. Taxation in the territories.
21. Exemption of state agencies from taxation by the United States.
22. Charges which are not taxes exempt from constitutional restraints.

23. Taxation by the states.
24. Expressed restraints upon state taxation.
25. Implied restraint upon state taxation resulting from the federal supremacy.
26. Taxation of national banks.
27. State taxation as affected by the prohibition of the impairment of the obligation of contracts.
28. State taxation as affected by the grant to Congress of the power of regulating commerce.

CHAPTER IV.

THE REGULATION OF COMMERCE.

29. The constitutional provisions.
30. The historical reason for the provisions.
31. Commerce defined.
32. Regulation of commerce defined.
33. The general principles defining the limits of national and state regulation.
34. The internal commerce of a state.
35. Navigable waters and the soil under them.
36. Preferences of ports.
37. Duties upon exports.
38. Duties upon tonnage.
39. Port dues.
40. Pilotage.
41. Regulation of navigation.
42. Port regulations.
43. Quarantine.
44. Ferries.
45. Bridges and dams.
46. Improvements of navigation.
47. Wharves and piers.
48. State duties upon imports and exports.
49. State inspection laws.
50. Taxation discriminating against goods from other states.
51. The original package doctrine.
52. Transportation: (a) State regulation in the exercise of the police power; (b) Regulation by taxation; (c) The Interstate Commerce Act.
53. The Anti-trust law.
54. Telegraphs.
55. Commerce with the Indian tribes.

CHAPTER V.

THE IMPAIRMENT OF THE OBLIGATION OF CONTRACTS.

56. The prohibition affects only state laws.
57. The term "law" defined.
58. Judgments of state courts not conclusive either as to the non-existence or non-impairment of contracts.
59. The obligation of a contract defined.
60. Legislation as to remedies.
61. The term "contracts" defined.
62. State insolvent laws.
63. Judgments as contracts.
64. Municipal taxation.
65. History of the prohibition.
66. State grants.
67. Express contracts of exemption from taxation.
68. Express grants of peculiar privileges.
69. Contracts between a state and its political subdivisions.
70. Implied contracts in charters of incorporation.
71. Implied corporate exemption from taxation.
72. Implied grants of peculiar privileges.
73. Exemption from the operation of the police power.
74. Contracts as to matters of public concern.
75. The withdrawal by a state of its consent to be sued.
76. The force and effect of the prohibition as construed by the Supreme Court.

CHAPTER VI.

EX POST FACTO LAWS AND BILLS OF ATTAINDER.

77. The constitutional provisions.
78. The distinction between retrospective and *ex post facto* laws.
79. *Ex post facto* laws defined.
80. Illustrations of *ex post facto* laws.
81. Illustrations of laws which are not *ex post facto*.
82. Bills of attainder and bills of pains and penalties.

CHAPTER VII.

THE PROHIBITION OF STATE BILLS OF CREDIT.

83. Bills of credit defined.
84. What are, and what are not, bills of credit.

CHAPTER VIII.

STATE COMPACTS.

85. What compacts are permitted, and what are forbidden.

CHAPTER IX.

FUGITIVES FROM JUSTICE.

86. The constitutional provision.
87. The concurrent jurisdiction of the federal and state courts.

CHAPTER X.

THE JUDICIAL POWER.

88. The constitutional provisions.
89. The theory of a judicial system under the common law.
90. The necessity of a federal judiciary.
91. Cases in law and equity, etc.
92. Cases affecting ambassadors, etc.
93. Admiralty.
94. Controversies to which the United States shall be a party.
95. Controversies between citizens of different states.
96. Controversies between two or more states.
97. Controversies between a state and citizens of another state, etc.
98. Federal jurisdiction.
99. Exclusive and concurrent jurisdiction.
100. The courts of the United States.
101. Original jurisdiction.
102. Appellate and supervisory jurisdiction.
103. The necessity of a judicial "case."
104. The federal judiciary.
105. The federal supremacy.
106. Constitutional and statutory construction.
107. Judgments of courts.
108. Treaties.
109. The law administered in the federal courts.
110. Courts martial and impeachments.
111. The IV Amendment.
112. The V Amendment—(*a*) Due process of law; (*b*) Jeopardy, etc.
113. The VI Amendment.
114. The VII and VIII Amendments.
115. The XI Amendment.

116. The relations between the federal and state courts.
117. The XIV Amendment as affecting state judicial proceedings.
118. The "full faith and credit" clause.

CHAPTER XI.

RIGHTS OF PERSON AND OF PROPERTY.

119. Citizenship of the United States.
120. Citizenship of a state.
121. The right of suffrage.
122. The right of serving on juries.
123. Congressional regulation of federal elections.
124. Immigrants and aliens.
125. Personal and property rights.
126. The rights within a state of citizens of other states.
127. Foreign corporations.
128. The I Amendment.
129. The XIII Amendment.
130. The XIV Amendment.
131. The equal protection of the laws.
132. The police power.

CHAPTER XII.

THE FEDERAL SUPREMACY AND THE RESERVED RIGHTS OF THE STATES.

133. The results of federal supremacy.
134. The constitutional reservation of the rights of the states.
135. The nature and extent of those reserved rights.
136. The importance of the preservation of the rights of both the United States and the states.

TABLE OF CASES CITED.

The references are to the pages.

A. A. P. Co. *v.* D. P. Co., 191 U. S. 373 282, 288
A. B. Co. *v.* Kansas, 193 U. S. 49 228
Aberdeen Bank *v.* Chehalis County, 166 U. S. 440 50, 52
Ableman *v.* Booth, 21 How. 506 18, 271
Achison *v.* Huddleson, 12 How. 293 97
Adams *v.* Nashville, 95 U. S. 19 49
v. New York, 192 U. S. 585 246, 320
A. Ex. Co. *v.* Kentucky, 166 U. S. 171 40, 57, 103
v. Michigan, 177 U. S. 404 206
v. Ohio, 165 U. S. 194, 166 *id.* 185 40, 54, 57, 103, 316
A. I. Co. *v.* Canter, 1 Pet. 511 8, 9, 19
Ainsa *v.* U. S., 184 U. S. 639 209
Alabama *v.* Georgia, 23 How. 505 191, 211
Albany Bridge Case, The, 2 Wall. 403 84
Allen *v.* Louisiana, 103 U. S. 80 233
v. Newberry, 21 How. 244 209
v. P. P. C. Co., 191 U. S. 171 55, 56, 58, 103, 105
v. S. P. R., 173 U. S. 479 224
Allgeyer *v.* Louisiana, 165 U. S. 578 63, 280
Almy *v.* California, 24 How. 169 57, 64, 88, 106
Ambrosini *v.* U. S., 187 U. S. 1 39
Ames *v.* Kansas, 111 U. S. 449 206, 221, 225
Amy *v.* Shelby County, 114 U. S. 387 179
v. Supervisors, 11 Wall. 136 266, 267
Anderson *v.* Dunn, 6 Wheat. 204 18
v. U. S., 171 U. S. 604 128
Andrews *v.* Andrews, 188 U. S. 14 283, 284, 286
v. Swartz, 156 U. S. 272 274, 282
Antoni *v.* Greenhow, 107 U. S. 769 145
A. P. Co. *v.* Fisher, 166 U. S. 464 256
A. P. & S. Co. *v.* U. S., 175 U. S. 211 67, 127, 251
Arbuckle *v.* Blackburn, 191 U. S. 405 215, 276, 319
Arkansas *v.* K. & T. C. Co., 183 U. S. 185 206, 210, 225
Armstrong *v.* Carson, 2 Dall. 302 283
v. Lear, 8 Pet. 52 229
Arndt *v.* Griggs, 134 U. S. 316 274
Arnson *v.* Murphy, 109 U. S. 238 265
Arrowsmith *v.* Harmoning, 118 U. S. 194 276
A. R. T. Co. *v.* Hall, 174 U. S. 70 40, 57, 103
A. Ry. *v.* New York, 176 U. S. 335 142, 161, 176, 278
Asher *v.* Texas, 128 U. S. 129 55, 92, 302
Ashley *v.* Ryan, 153 U. S. 436 22, 55, 103, 304, 305, 306
A. S. of M. H. *v.* McAnnulty, 187 U. S. 94 229
Aspinwall *v.* Daviess County, 22 How. 364 148, 149
A. S. R. Co. *v.* Louisiana, 179 U. S. 89 320
Asylum *v.* New Orleans, 105 U. S. 362 52, 162, 163
A. S. & W. Co. *v.* Speed, 192 U. S. 500 43, 55, 87, 92, 94
Atherton *v.* Atherton, 181 U. S. 155 286

The references are to the pages.

Atkin *v.* Kansas, 191 U. S. 207 278, 319
A., T. & S. F. R. *v.* Matthews, 174 U. S. 96 313, 314, 318
Austin *v.* Tennessee, 179 U. S. 343 96
Auten *v.* U. S. Nat. Bank, 174 U. S. 125 206
A. V. L. & C. Co. *v.* Mann, 130 U. S. 69 257
Ayers, *In re*, 123 U. S. 443 180, 261
A. & P. T. Co. *v.* Philadelphia, 190 U. S. 160 24, 134

Backus *v.* F. S. U. D. Co., 169 U. S. 557 274, 277
Bacon *v.* Howard, 20 How. 22 283
Bailey *v.* Maguire, 22 Wall. 215 174
Bain, *Ex parte*, 121 U. S. 1 247
Baker *v.* Grice, 169 U. S. 284 225
Baldwin *v.* Franks, 120 U. S. 678 233, 238
v. Hale, 1 Wall. 223 147, 152, 153
Baltimore *v.* B. T. Co., 166 U. S. 673 177
Baltzer *v.* North Carolina, 161 U. S. 240 180
Banholzer *v.* N. Y. L. I. Co., 178 U. S. 402 282
Bank *v.* Supervisors, 7 Wall. 26 44
Bank of Alabama *v.* Dalton, 9 How. 522 267, 283, 288
Bank of Augusta *v.* Earle, 13 Pet. 519 63, 304, 305
Bank of Columbia *v.* Okely, 4 Wheat. 235 256
Bank of Commerce *v.* Tennessee, 161 U. S. 134, 163 *id.* 416 162
Bank of Hamilton *v.* Dudley's Lessee, 2 Pet. 492 204
Bank of Kentucky *v.* Wister, 2 Pet. 318 262
Bank of Redemption *v.* Boston, 125 U. S. 60 50
Bank of U. S. *v.* Deveaux, 5 Cr. 61 303
v. Halstead, 10 Wheat. 51 265
v. Planters' Bank, 9 Wheat. 904 262
Bank of Washington *v.* Arkansas, 20 How. 530 180
Banks *v.* Mayor, 7 Wall. 16 44
Bank Tax Case, 2 Wall. 200 44
Barber *v.* Barber, 21 How. 582 210
Barbier *v.* Connolly, 113 U. S. 27 314, 321
Barings *v.* Dabney, 19 Wall. 1 169
Barney *v.* Baltimore, 6 Wall. 280 210
v. City of New York, 193 U. S. 430 280, 319, 323
v. Keokuk, 94 U. S. 324 72
Barnitz *v.* Beverly, 163 U. S. 118 146
Barrett *v.* Holmes, 102 U. S. 651 143, 279
Barron *v.* Baltimore, 7 Pet. 243 247
v. Burnside, 121 U. S. 186 307
Bartemeyer *v.* Iowa, 18 Wall. 129 100, 298
Bartlett *v.* Lockwood, 160 U. S. 357 80
Barton *v.* Barbour, 104 U. S. 126 255
Bates *v.* Clark, 95 U. S. 204 264
Bath County *v.* Amy, 13 Wall. 244 267
Bauman *v.* Ross, 167 U. S. 548 11, 251, 253
Bausman *v.* Dixon, 173 U. S. 113 206
Bayard *v.* Singleton, 1 Martin, (N. C.) 42 233
B. B. & B. C. R. *v.* New Whatcom, 172 U. S. 314 277
Beatty *v.* Benton, 135 U. S. 244 224
Bedford *v.* E. B. & L. Assn., 181 U. S. 227 142, 306
v. U. S., 192 U. S. 217 253
Beer Co. *v.* Massachusetts, 97 U. S. 25 100, 176, 178
Beers *v.* Arkansas, 20 How. 527 180, 181
Belden *v.* Chase, 150 U. S. 674 206, 209
Belfast, The, 7 Wall. 624 208, 209, 269
Belknap *v.* Schild, 161 U. S. 10 209, 253
Bell *v.* Bell, 181 U. S. 175 286
Bellaire *v.* B. & O. R., 146 U. S. 117 225
Bement *v.* N. H. Co., 186 U. S. 70 126, 128
Benjamin *v.* New Orleans, 169 U. S. 161 215
Benner *v.* Porter, 9 How. 235 9
B. G. R. *v.* Pennsylvania, 134 U. S. 232 41, 43, 316
Bier *v.* McGehee, 148 U. S. 137 139, 148, 149
Bigby *v.* U. S., 188 U. S. 400 209

The references are to the pages.

Bigler *v.* Waller, 14 Wall. 297 21
Billings *v.* Illinois, 188 U. S. 97 41, 316
Bingham *v.* Cabot, 3 Dall. 382 215
Binghamton Bridge, 3 Wall. 51 167, 168, 175
Bischoff *v.* Wethered, 9 Wall. 812 284
Blackstone *v.* Miller, 188 U. S. 189 40, 41, 140
Blair *v.* Cuming County, 111 U. S. 363 25
Blake *v.* McClung, 172 U. S. 239 215, 303, 304, 319
v. McClung, 176 U. S. 59 303
In re, 175 U. S. 114 267
Blount *v.* Walker, 134 U. S. 607 287
v. Windley, 95 U. S. 173 144, 148, 153
Blyew *v.* U. S., 13 Wall. 581 206
Board of Assrs. *v.* C. N. D'E., 191 U. S. 388 40, 41
Board of Liquidation *v.* Louisiana, 179 U. S. 622 141
v. McComb, 92 U. S. 531 263, 264
Board of Pub. Works *v.* Columbia College, 17 Wall. 521 284
Bock *v.* Perkins, 139 U. S. 628 19, 206, 225, 272
Bolles *v.* Brimfield, 120 U. S. 759 242
Bollman and Swartwout, *Ex parte,* 4 Cr. 75 243, 250
Bolln *v.* Nebraska, 176 U. S. 83 2, 274
Bonaparte *v.* Tax Court, 104 U. S. 592 23, 42
Boom Co. *v.* Patterson, 98 U. S. 403 210
Booth *v.* Illinois, 184 U. S. 425 232, 279, 321
Borer *v.* Chapman, 119 U. S. 587 265
Börs *v.* Preston, 111 U. S. 252 221
Boske *v.* Comingore, 177 U. S. 459 18, 206, 215, 224, 225, 238, 270
Boswell's Lessee *v.* Otis, 9 How. 336 273, 285
Botiller *v.* Dominguez, 130 U. S. 238 238
Bowman *v.* C. & N. W. Ry., 125 U. S. 465 69, 94, 102
v. Middleton, 1 Bay, (S. C.) 252 233
Boyce *v.* Tabb, 18 Wall. 546 310
Boyd *v.* Alabama, 94 U. S. 645 176
v. Nebraska, 143 U. S. 135 224, 291
v. U. S., 116 U. S. 616 246
Boyd, *Ex parte,* 105 U. S. 647 210
Boyer *v.* Boyer, 113 U. S. 689 50
Boyle *v.* Zacharie, 6 Pet. 635 147, 151
Bradfield *v.* Roberts, 175 U. S. 291 309
Bradley *v.* Lightcap, 195 U. S. 1 146, 276
v. The People, 4 Wall. 459 49
Bradwell *v.* State, 16 Wall 130 301, 311
Brass *v.* North Dakota, 153 U. S. 391 98, 278, 315, 317
Breithaupt *v.* Bank of Georgia, 1 Pet. 238 215
Brennan *v.* Titusville, 153 U. S. 289 55, 92
Bridge Proprietors *v.* Hoboken Co., 1 Wall. 116 141, 168
Brimmer *v.* Rebman, 138 U. S. 78 54, 89, 91
Briscoe *v.* Bank of Kentucky, 11 Pet. 257 3, 189, 190, 234, 262
Bristol *v.* Washington County, 177 U. S. 133 22, 40, 41
Bronson *v.* Kimpton, 8 Wall. 444 20
v. Kinzie, 1 How. 311 146
v. Rodes, 7 Wall. 229 20
Brown *v.* Houston, 114 U. S. 622 54, 69, 90, 94, 104
v. Huger, 21 How. 305 264
v. Keene, 8 Pet. 112 215
v. Maryland, 12 Wheat. 419 28, 43, 62, 88, 93, 94, 235
v. New Jersey, 175 U. S. 172 274, 282, 298, 320, 322
v. Smart, 145 U. S. 454 139
v. Trousdale, 138 U. S. 389 225
v. Walker, 161 U. S. 591 111, 232, 252
In re, 135 U. S. 701 143
Brownfield *v.* South Carolina, 189 U. S. 426 313
Bryan *v.* Board of Education, 151 U. S. 639 141, 165
v. Virginia, 135 U. S. 685 147
B. T. Co. *v.* B. B. R., 151 U. S. 137 276, 282
Bucher *v.* C. R., 125 U. S. 555 210, 243, 282

The references are to the pages.

Buck *v.* Colbath, 3 Wall. 334 273
Buckner *v.* Finley, 2 Pet. 586 2
Budd *v.* New York, 143 U. S. 517 98, 101a, 278, 315
Burgess *v.* Seligman, 107 U. S. 20 240, 242
Burlington *v.* Beasley, 94 U. S. 310 24
Burthe *v.* Denis, 133 U. S. 514 206, 224
Bush *v.* Kentucky, 107 U. S. 110 216, 313
Butchers' Union *v.* C. C. Co., 111 U. S. 746 178
Butler *v.* B. & S. S. Co., 130 U. S. 527 208, 209, 238
v. Horwitz, 7 Wall. 258 20
v. Pennsylvania, 10 How. 402 147, 179
Butterworth *v.* Hoe, 112 U. S. 50 229
Buttfield *v.* Stranahan, 192 U. S. 470 66, 232, 251
B. W. S. Co. *v.* Mobile, 186 U. S. 212 165
Byers *v.* McAuley, 149 U. S. 608 210, 266, 272
Byrne *v.* Missouri, 8 Pet. 40 189
B. & O. R. *v.* Harris, 12 Wall. 65 215
v. Maryland, 21 Wall. 456 23, 56, 102
B. & S. R. *v.* Nesbit, 10 How. 395 182, 183

Cable *v.* U. S. L. I. Co., 191 U. S. 288 307
Calder *v.* Bull, 3 Dall. 386 182, 183, 184
Caldwell *v.* Carrington, 9 Pet. 86 283
v. North Carolina, 187 U. S. 622 55
v. Texas, 137 U. S. 692 273
California *v.* C. P. R., 127 U. S. 1 54, 103, 305
v. S. P. Co., 157 U. S. 229 213
Callan *v.* Wilson, 127 U. S. 540 10, 246, 252
Cameron *v.* Hodges, 127 U. S. 322 210, 215
Campbell *v.* Holt, 115 U. S. 620 279
v. Wade, 132 U. S. 34 148, 149
Cannon *v.* New Orleans, 20 Wall. 577 44, 74, 76
Caperton *v.* Ballard, 14 Wall. 238 283
Capron *v.* Van Noorden, 2 Cr. 126 215
Cardwell *v.* A. B. Co., 113 U. S. 205 84
Carneal *v.* Banks, 10 Wheat. 181 238
Carpenter *v.* Pennsylvania, 17 How. 456 41, 42, 182, 183
v. Strange, 141 U. S. 87 285
Carroll County *v.* Smith, 111 U. S. 556 242
Carson *v.* Brocton S. Com., 182 U. S. 398 24, 277
Carstairs *v.* Cochran, 193 U. S. 10 40
Carter *v.* McClaughry, 183 U. S. 365 252
v. Texas, 177 U. S. 442 295, 313, 319
Case *v.* Kelly, 133 U. S. 21 243
Cates *v.* Allen, 149 U. S. 451 255
C., B. & Q. R. *v.* Chicago, 166 U. S. 226 101a, 176, 257, 277
v. Iowa, 94 U. S. 155 98, 176, 177
v. Nebraska, 170 U. S. 57 141, 176, 177, 178
C., C., C. & St. L. Ry. *v.* Backus, 154 U. S. 439 22, 40, 57, 103
v. Illinois, 177 U. S. 514 101
C. C. D. Co. *v.* Ohio, 183 U. S. 238 206, 247, 279, 298, 315
C., C. & A. R. *v.* Gibbes, 142 U. S. 386 24, 278, 304, 314, 316
C. D. Co. *v.* Shepherd, 20 How. 227 303
Central Nat. Bank *v.* Stevens, 169 U. S. 432 272
Central R. & B. Co. *v.* Wright, 164 U. S. 327 53, 162, 166
C. F. D. N. *v.* Louisiana, 186 U. S. 380 80
Chadwick *v.* Kelley, 187 U. S. 540 228, 316
Chandler *v.* Dix, 194 U. S. 590 260
Chapman *v.* Barney, 129 U. S. 677 215
In re, 166 U. S. 661 18
Chappell *v.* U. S., 160 U. S. 499 19
v. Waterworth, 155 U. S. 102 215, 225
Charles River Bridge *v.* Warren Bridge, 11 Pet. 544 174
Cheever *v.* Wilson, 9 Wall. 108 283

The references are to the pages.

Chemung Canal Bank *v.* Lowery, 93 U. S. 72 302
Cherokee Nation *v.* Georgia, 5 Pet. 1 135, 213, 229
v. S. K. Ry., 135 U. S. 641 135, 253
Cherokee Tobacco, The, 11 Wall. 616 238
Chicago *v.* Sheldon, 9 Wall. 50 52, 139, 162, 163
Chicago Theological Seminary *v.* Illinois, 188 U. S. 662 53, 166
China, The, 7 Wall. 53 77
Chin Bak Kan *v.* U. S., 186 U. S. 193 297
Chinese Exclusion Case, 130 U. S. 581 19, 238, 239, 296, 297
Chirac *v.* Chirac, 2 Wheat. 259 238, 291
Chisholm *v.* Georgia, 2 Dall. 419 205, 214, 258
Chittenden *v.* Brewster, 2 Wall. 191 266
Christ Church *v.* Philadelphia, 24 How. 300 164
Christmas *v.* Russell, 5 Wall. 290 283
Christy, *Ex parte,* 3 How. 292 268
Church *v.* Hubbart, 2 Cr. 187 229
v. Kelsey, 121 U. S. 282 179, 274
Chy Lung *v.* Freeman, 92 U. S. 275 57, 105, 296
Citizens' Bank *v.* Parker, 192 U. S. 73 52, 162, 166
Citizens' Savings Bank *v.* Owensboro, 173 U. S. 636 53, 165, 166
Citizens' S. & L. Assn. *v.* Perry County, 156 U. S. 692 148
City *v.* Lamson, 9 Wall. 477 139
City of Panama, 101 U. S. 453 9
Civil Rights Cases, 109 U. S. 3 323
Claflin *v.* Houseman, 93 U. S. 130 218, 268, 269
Clark *v.* Barnard, 108 U. S. 436 260, 265
v. Bever, 139 U. S. 96 210, 242, 243
v. Kansas City, 176 U. S. 114 320
v. Titusville, 184 U. S. 329 41, 316
Clarke *v.* Clarke, 178 U. S. 186 210, 284, 285
Clarke, *Ex parte,* 100 U. S. 399 296
Clay *v.* Field, 138 U. S. 464 310
C. L. Co. *v.* Laidley, 159 U. S. 103 140, 276
Cleveland *v.* C. C. Ry., 194 U. S. 517 178
v. C. E. Ry., 194 U. S. 538 178
C. L. I. Co. *v.* Needles, 113 U. S. 574 140, 175
Clinton *v.* Englebrecht, 13 Wall. 434 9
Clinton Bridge, The, 10 Wall. 454 83
Close *v.* Glenwood Cemetery, 107 U. S. 466 165
C. M. Co. *v.* Ferguson, 113 U. S. 727 234, 308
C. M. L. I. Co. *v.* Cushman, 108 U. S. 51 143
v. Spratley, 172 U. S. 602 142, 148, 176, 308
C., M. & St. P. Ry. *v.* Minnesota, 134 U. S. 418 101a, 176, 177, 278, 313
v. Solan, 169 U. S. 133 99, 140, 148, 243
v. Tompkins, 176 U. S. 167 101a, 278, 315
C. N. B. & L. Assn. *v.* Denson, 189 U. S. 408 308
C., N. O. & T. P. Ry. *v.* I. C. C., 162 U. S. 184 110, 111
Codlin *v.* Kohlhausen, 181 U. S. 151 228
Coe *v.* Errol, 116 U. S. 517 22, 41, 55, 69, 104
Cohens *v.* Virginia, 6 Wheat. 264 204, 205, 206, 210, 214, 217, 224, 228, 236, 262
Cole *v.* Cunningham, 133 U. S. 107 266, 283, 284
v. La Grange, 113 U. S. 1 24
Collector *v.* Day, 11 Wall. 113 39
Collet *v.* Collet, 2 Dall. 294 291
Commercial Bank *v.* Chambers, 182 U. S. 556 50
Commissioners of Tippecanoe *v.* Lucas, 93 U. S. 108 275
Commonwealth *v.* Caton, 4 Call, (Va.) 5 233
Conner *v.* Elliott, 18 How. 593 301
Connolly *v.* U. S. P. Co., 184 U. S. 540 41, 126, 204, 233, 314, 316
Connors *v.* U. S., 158 U. S. 408 296
Contzen *v.* U. S., 179 U. S. 191 291

The references are to the pages.

Converse, *In re*, 137 U. S. 624 276
Conway *v.* Taylor, 1 Bl. 603 82, 100
Cook *v.* Hart, 146 U. S. 183 195
v. Moffat, 5 How. 295 147, 152
v. Pennsylvania, 97 U. S. 566 43, 62, 88
v. U. S., 138 U. S. 157 186, 254
Cook County *v.* C. & C. C. & D. Co., 138 U. S. 635 224
Cooke *v.* Avery, 147 U. S. 375 206
Cooley *v.* Board of Wardens, 12 How. 299 69, 76
Cooper *v.* Newell, 173 U. S. 555 283, 285, 287
v. Reynolds, 10 Wall. 308 285
In re, 143 U. S. 472 228
Corfield *v.* Coryell, 4 Wash. C. C. 371 300
Cornell *v.* Coyne, 192 U. S. 418 29, 73
Corson *v.* Maryland, 120 U. S. 502 55, 91, 302
Cosgrove *v.* Winney, 174 U. S. 64 194, 250
Cotting *v.* K. C. S. Y. Co., 183 U. S. 79 278, 313
Coughran *v.* Bigelow, 164 U. S. 301 256
Counselman *v.* Hitchcock, 142 U. S. 547 110
County of Livingston *v.* Darlington, 101 U. S. 407 24
County of Mobile *v.* Kimball, 102 U. S. 691 62, 69, 85, 86
County of Moultrie *v.* Rockingham T. C. S. Bank, 92 U. S. 631 138, 148, 154
County of Ralls *v.* Douglass, 105 U. S. 728 139
Covell *v.* Heyman, 111 U. S. 176 271, 272
Covington *v.* Kentucky, 173 U. S. 231 165
Cowles *v.* Mercer County, 7 Wall. 118 305
Coy, *In re*, 127 U. S. 731 296
C. P. Co. *v.* Beckwith, 188 U. S. 567 282
C. P. R. *v.* California, 162 U. S. 91 47
v. Nevada, 162 U. S. 512 46
Craig *v.* Missouri, 4 Pet. 411 189
Crandall *v.* Nevada, 6 Wall. 35 47, 89, 104, 303
Crenshaw *v.* U. S., 134 U. S. 99 179
C., R. I. & P. Ry. *v.* Sturm, 174 U. S. 710 288
v. Zernecke, 183 U. S. 582 278
Cronin *v.* Adams, 192 U. S. 108 278
Cross *v.* Allen, 141 U. S. 528 210, 242, 243, 282
v. Harrison, 16 How. 164 27
v. North Carolina, 132 U. S. 131 269, 272, 276
Crossley *v.* California, 168 U. S. 640 225, 269
Crossman *v.* Lurman, 192 U. S. 189 96, 100
Crow Dog, *Ex parte*, 109 U. S. 556 136
Crowley *v.* Christensen, 137 U. S. 86 322
Cruickshank *v.* Bidwell, 176 U. S. 73 229
Crutcher *v.* Kentucky, 141 U. S. 47 55, 56, 93, 105, 305
C. Ry. *v.* C. S. R., 166 U. S. 557 163, 165
C. R. & B. Co. *v.* Wright, 164 U. S. 327 53, 162, 166
C. S. Ry. *v.* Gebhard, 109 U. S. 527 308
v. Snell, 193 U. S. 30 318
v. Wright, 151 U. S. 470 317
C. T. Co. *v.* Hof, 174 U. S. 1 10, 257
v. Lander, 184 U. S. 111 45, 48
Cumming *v.* Board of Education, 175 U. S. 528 298, 322
Cummings *v.* Chicago, 188 U. S. 410 83
v. Missouri, 4 Wall. 277 184, 185, 187, 188
v. National Bank, 101 U. S. 153 51
Cunningham *v.* M. & B. R., 109 U. S. 446 260
Curran *v.* Arkansas, 15 How. 304 169, 262
Curtis *v.* Whitney, 13 Wall. 68 144
Ex parte, 106 U. S. 371 19
C. & A. R. *v.* W. F. Co., 108 U. S. 18 283
v. W. F. Co., 119 U. S. 615 229, 230, 282
C. & B. Co. *v.* New Orleans, 99 U. S. 97 45

The references are to the pages.

C. & C. B. Co. *v.* Kentucky, 154 U. S. 204 66, 70, 84, 169
C. & G. T. Ry. *v.* Wellman, 143 U. S. 339 101a, 278
C. & L. T. R. Co. *v.* Sandford, 164 U. S. 578 53, 101a, 168, 174, 175 178, 304, 314, 315
C. & N. W. Ry. *v.* Chicago, 164 U. S. 454 224
C. & O. Ry. *v.* Kentucky, 179 U. S. 388 78, 98

Daniel Ball, The, 10 Wall. 557 68, 77, 82, 209
D'Arcy *v.* Ketchum, 11 How. 165 284
Darrington *v.* Bank of Alabama, 13 How. 12 190
Dartmouth College *v.* Woodward, 4 Wheat. 518 147, 170, 178
Davenport Bank *v.* Davenport, 123 U. S. 83 49
Davidson *v.* New Orleans, 96 U. S. 97 247, 277
Davis *v.* Beason, 133 U. S. 333 309
v. Burke, 179 U. S. 399 225, 274
v. Elmira Savings Bank, 161 U. S. 275 271
v. Gray, 16 Wall. 203 161, 259, 263
v. Massachusetts, 167 U. S. 43 280
v. Packard, 7 Pet. 276 269
Day *v.* Gallup, 2 Wall. 97 273
D. C. & I. Co. *v.* Barton, 183 U. S. 23 304
Debs, *In re,* 158 U. S. 564 4, 126, 246, 274
In re, 64 Fed. 724 126
Decatur *v.* Paulding, 14 Pet. 497 229
Delaware R. Tax Case, 18 Wall. 206 53, 56, 102, 174
De Lima *v.* Bidwell, 182 U. S. 1 11, 19, 27, 38, 229, 238
Delmas *v.* Ins. Co., 14 Wall. 661 140, 141, 146
Den *v.* Jersey Co., 15 How. 426 71
Dennick *v.* R. Co., 103 U. S. 11 210
Denny *v.* Bennett, 128 U. S. 489 139, 153
v. Pironi, 141 U. S. 121 215
Dent *v.* West Virginia, 129 U. S. 114 278

Deposit Bank *v.* Frankfort, 191 U. S. 499 289
De Saussure *v.* Gaillard, 127 U. S. 216 224
De Treville *v.* Smalls, 98 U. S. 517 35
Detroit *v.* D. C. S. R., 184 U. S. 368 139, 178
v. Parker, 181 U. S. 399 273, 277, 316
Dewey *v.* Des Moines, 173 U. S. 193 22, 24, 224, 273
D. G. Co. *v.* U. S. G. Co., 187 U. S. 611 140, 304, 306
Dial *v.* Reynolds, 96 U. S. 340 266
Dietzsch *v.* Huidekoper, 103 U. S. 494 267
Diggs *v.* Wolcott, 4 Cr. 179 266
D. M. Co. *v.* Ontonagon, 188 U. S. 82 55
Dobbins *v.* Commissioners, 16 Pet. 435 44
Dodge *v.* Woolsey, 18 How. 331 204
Doe *v.* Beebe, 13 How. 25 299
Dooley *v.* Pease, 180 U. S. 126 210, 241, 243
v. Smith, 13 Wall. 604 21
v. U. S., 182 U. S. 222 11, 27
v. U. S., 183 U. S. 151 11, 19, 28, 73
Dorr *v.* U. S., 195 U. S. 138 11, 12
Douglas *v.* Kentucky, 168 U. S. 488 141, 178
Douglass *v.* County of Pike, 101 U. S. 677 139
Dow *v.* Beidelman, 125 U. S. 680 101a, 278, 315
Downes *v.* Bidwell, 182 U. S. 244 1, 4, 11, 13, 19, 27, 37, 234
Downham *v.* Alexandria Council, 10 Wall. 173 55, 92, 302
Doyle *v.* C. I. Co., 94 U. S. 535 307
Dred Scott *v.* Sandford, 19 How. 393 8, 215, 231, 291, 292
Drehman *v.* Stifle, 8 Wall. 595 144
Dreyer *v.* Illinois, 187 U. S. 71 224, 252, 280
Ducat *v.* Chicago, 10 Wall. 410 63, 305, 306
Duncan *v.* Darst, 1 How. 301 271
v. Missouri, 152 U. S. 377 184, 187, 274, 275, 298, 322
In re, 139 U. S. 449 225, 282

The references are to the pages.

Dupasseur *v.* Rochereau, 21 Wall. 130 289
Durousseau *v.* U. S., 6 Cr. 307 223
Dynes *v.* Hoover, 20 How. 65 244
D. & H. C. Co. *v.* Pennsylvania, 156 U. S. 200 22, 23, 43

Eagle, The, 8 Wall. 15 209
Earle *v.* Conway, 178 U. S. 456 271, 272
v. Pennsylvania, 178 U. S. 449 272
East Hartford *v.* H. Bridge Co., 10 How. 511 170
Easton *v.* Iowa, 188 U. S. 220 238, 269
E. B. & L. Assn. *v.* Ebaugh, 185 U. S. 114 282
v. Williamson, 189 U. S. 122 282
Edwards *v.* Elliott, 21 Wall. 532 208, 243, 255, 266, 269
v. Kearzey, 96 U. S. 595 138
Effinger *v.* Kenney, 115 U. S. 566 146
E. I. Co. *v.* Ohio, 153 U. S. 446 176
Eidman *v.* Martinez, 184 U. S. 578 40
Eilenbecker *v.* Plymouth County, 134 U. S. 31 274, 298
Eldridge *v.* Trezevant, 160 U. S. 452 278, 280, 317
Elk *v.* Wilkins, 112 U. S. 94 291
E. L. L. Co. *v.* Brown, 155 U. S. 488 215, 225
Ellenwood *v.* M. C. Co., 158 U. S. 105 210, 243
Elliott *v.* Peirsol, 1 Pet. 328 284
Elmendorf *v.* Taylor, 10 Wheat. 152 282
Emblen *v.* L. L. Co., 184 U. S. 660 253
Embry *v.* Palmer, 107 U. S. 3 18, 289
Emert *v.* Missouri, 156 U. S. 296 55, 90, 92, 303
Ennis *v.* Smith, 14 How. 400 229, 285
Erb *v.* Morasch, 177 U. S. 584 99, 282, 283
Erie Ry. *v.* Penna., 21 Wall. 492 53, 174
Erwin *v.* Lowry, 7 How. 172 267, 272
E. Ry. *v.* Pennsylvania, 15 Wall. 282 58, 105
Escanaba Co. *v.* Chicago, 107 U. S. 678 84, 100

Essex Pub. Road Board *v.* Skinkle, 140 U. S. 334 170
Etheridge *v.* Sperry, 139 U. S. 266 224, 270, 272
E. T., V. & G. Ry. *v.* I. C. C., 181 U. S. 1 113
Eustis *v.* Bolles, 150 U. S. 361 224
Evansville Bank *v.* Britton, 105 U. S. 322 51
Ewell *v.* Daggs, 108 U. S. 143 143
Ex parte Bain, 121 U. S. 1 247
Bollman and Swartwout, 4 Cr. 75 243, 250
Boyd, 105 U. S. 647 210
Christy, 3 How. 292 268
Clarke, 100 U. S. 399 296
Crow Dog, 109 U. S. 556 136
Curtis, 106 U. S. 371 19
Ferry Co., 104 U. S. 519 208, 243
Fonda, 117 U. S. 516 18
Garland, 4 Wall. 333 185, 188
Gordon, 104 U. S. 515 208, 243
Jackson, 96 U. S. 727 18
Kearney, 7 Wheat. 38 250
Lange, 18 Wall. 163 250, 252
Madrazzo, 7 Pet. 627 261
Mason, 105 U. S. 696 244
McNiel, 13 Wall. 236 76, 266
Milligan, 4 Wall. 2 244, 245, 250
Parks, 93 U. S. 18 250
Reggel, 114 U. S. 642 193, 195
Royall, 117 U. S. 241 18, 225
Siebold, 100 U. S. 371 296
Terry, 128 U. S. 289 250, 254
Virginia, 100 U. S. 339 295, 313
Wall, 107 U. S. 265 247
Wells, 18 How. 307 250
Wilson, 114 U. S. 417 247
Yarbrough, 110 U. S. 651 18, 19, 250, 293, 296
Express Co. *v.* Kountze Bros., 8 Wall. 342 303
Eyster *v.* Gaff, 91 U. S. 521 268

Fairbank *v.* U. S., 181 U. S. 283 28, 30, 64, 74, 232
Fallbrook Irr. Dist. *v.* Bradley, 164 U. S. 112 24, 277, 282
Fanning *v.* Gregoire, 16 How. 524 82, 100, 175
Fargo *v.* Hart, 193 U. S. 490 40, 57, 103
v. Michigan, 121 U. S. 230 58, 105

The references are to the pages.

Farmers & Mechanics' Bank *v.* Smith, 6 Wheat. 131 147, 150, 152
Farrington *v.* Tennessee, 95 U. S. 679 162
F. C. & P. R. *v.* Reynolds, 183 U. S. 471 316, 321
Felsenheld *v.* U. S., 186 U. S. 126 70
Ferguson *v.* Harwood, 7 Cr. 408 283
Ferry Co., *Ex parte,* 104 U. S. 519 208, 243
Fertilizing Co. *v.* Hyde Park, 97 U. S. 659 176, 178
F.-G. L. S. Co. *v.* Springer, 185 U. S. 47 206
Ficklen *v.* Shelby County, 145 U. S. 1 55, 92, 303
Field *v.* B. A. P. Co., 194 U. S. 618 277, 316
Fielden *v.* Illinois, 143 U. S. 452 280
Filhiol *v.* Maurice, 185 U. S. 108 206
Finney *v.* Guy, 189 U. S. 335 282
First National Bank *v.* Ayers, 160 U. S. 660 50
First Nat. Bank of Louisville *v.* Louisville, 174 U. S. 438 51
Fischer *v.* St. Louis, 194 U. S. 361 279, 321
Fisk *v.* Jefferson Police Jury, 116 U. S. 131 138, 148, 154, 179
Fitts *v.* McGhee, 172 U. S. 516 263
Fleming *v.* Page, 9 How. 603 26
Fletcher *v.* Peck, 6 Cr. 87 147, 160, 182, 184, 232
Florida *v.* Georgia, 11 How. 293; 17 *id.* 478 191, 211
F. L. R. *v.* Lowe, 114 U. S. 525 46
F. M. L. Assn. *v.* Mettler, 185 U. S. 308 313, 318
Fok Yung Yo *v.* U. S., 185 U. S. 296 229, 297
Fonda, *Ex parte,* 117 U. S. 516 18
Fong Yue Ting *v.* U. S., 149 U. S. 698 19, 238, 254, 297
Forbes *v.* Gracey, 94 U. S. 762 46
Ford *v.* D. & P. L. Co., 164 U. S. 662 24, 53, 166, 167
v. Surget, 97 U. S. 594 139, 191
Forsyth *v.* Hammond, 166 U. S. 506 282
Foster *v.* Davenport, 22 How. 244 77, 79, 101
v. Kansas, 112 U. S. 201 100
v. Master and Wardens of New Orleans, 94 U. S. 246 75
v. Neilson, 2 Pet. 253 238
Fourteen Diamond Rings, Pepke, Claimant, *v.* U. S., 183 U. S. 176 11, 27, 38
Fouvergne *v.* New Orleans, 18 How. 470 210
Fowler *v.* Lindsey, 3 Dall. 411 262
Fox *v.* Ohio, 5 How. 432 269
Francis Wright, The, 105 U. S. 381 223
Frederich, *In re,* 149 U. S. 70 215, 225
Frederickson *v.* Louisiana, 23 How. 445 239
Freeborn *v.* Smith, 2 Wall. 160 183
Freeland *v.* Williams, 131 U. S. 405 148, 154, 274
Freeman *v.* Alderson, 119 U. S. 185 285
v. Howe, 24 How. 450 271, 272
Fremont *v.* U. S., 17 How. 542 230
French *v.* B. A. P. Co., 181 U. S. 324 24, 277, 316
v. Hay, 22 Wall. 250 267
Fretz *v.* Bull, 12 How. 466 209
Friedlander *v.* T. & P. Ry., 130 U. S. 416 210, 243, 282
Fritts *v.* Palmer, 132 U. S. 282 308
Furman *v.* Nichol, 8 Wall. 44 169
F. W. Co. *v.* Freeport City, 180 U. S. 587 141, 169, 176, 177, 178
F. & C. P. R. *v.* Reynolds, 183 U. S. 471 40, 41
F. & M. Bank *v.* Smith, 6 Wheat. 131 147, 150, 152
F. & M. C. Co. *v.* Fitzgerald, 137 U. S. 98 308
F. & M. I. Co. *v.* Dobney, 189 U. S. 301 313, 318

Gableman *v.* P., D. & E. Ry., 179 U. S. 335 206, 270
Gaines *v.* Fuentes, 92 U. S. 10 210
Gallup *v.* Schmidt, 183 U. S. 300 273, 277
Gantly *v.* Ewing, 3 How. 707 146
Garland, *Ex parte,* 4 Wall. 333 185, 188
Garnett, *In re,* 141 U. S. 1 207, 243

The references are to the pages.

G., C. & S. F. Ry. *v.* Ellis, 165 U. S. 150 278, 304, 313, 314
v. Hefley, 158 U. S. 98 101, 113, 217, 238
Geer *v.* Connecticut, 161 U. S. 519 72, 301
Gelpcke *v.* Dubuque, 1 Wall. 175 139, 242
Gelston *v.* Hoyt, 3 Wheat. 246 217, 228, 270
Genesee Chief, The, *v.* Fitzhugh, 12 How. 443 206, 209
Geofroy *v.* Riggs, 133 U. S. 258 238
Georgia *v.* Brailsford, 2 Dall. 402 260
v. Stanton, 6 Wall. 50 229
Georgia, Governor of, *v.* Madrazo, 1 Pet. 110 260, 261
G. F. Co. *v.* Pennsylvania, 114 U. S. 196 57, 82, 106
Gibbons *v.* Ogden, 9 Wheat. 1 15, 54, 62, 64, 66, 69, 77, 89, 97, 234, 235
Gibson *v.* Mississippi, 162 U. S. 565 184, 186, 295, 313
v. U. S., 166 U. S. 269 253
Giles *v.* Harris, 189 U. S. 475 293, 294
v. Teasley, 193 U. S. 146 293, 295
Gilfillan *v.* U. C. Co., 109 U. S. 401 143
Gilman *v.* Philadelphia, 3 Wall. 713 4, 84, 217
v. Sheboygan, 2 Bl. 510 24, 154
Ginesi *v.* Cooper, 14 Ch. Div. 601 237
Giozza *v.* Tiernan, 148 U. S. 657 41, 273, 298, 316, 317
Gladson *v.* Minnesota, 166 U. S. 427 99, 101
Glass *v.* Sloop Betsey, 3 Dall. 6 284
Glenn *v.* Garth, 147 U. S. 360 282
Glidden *v.* Harrington, 189 U. S. 255 277
Glide, The, 167 U. S. 606 209
Godfrey *v.* Terry, 97 U. S. 171 215
Gonzales *v.* Williams, 192 U. S. 1 298
Good *v.* Martin, 95 U. S. 90 9
Goodrich *v.* Detroit, 184 U. S. 432 24, 277
Goodtitle *v.* Kibbe, 9 How. 471 299
Goodwin *v.* C. M. I. Co., 110 U. S. 1 307
Gordon *v.* U. S., 2 Wall. 561 223
Ex parte, 104 U. S. 515 208, 243
Governor of Georgia *v.* Madrazo, 1 Pet. 110 260, 261
Grace *v.* A. C. I. Co., 109 U. S. 278 215
Grand Lodge *v.* New Orleans, 166 U. S. 143 164
Gray *v.* Connecticut, 159 U. S. 74 298
Green *v.* Biddle, 8 Wheat. 1 142, 161, 169
v. Creighton, 23 How. 90 271
In re, 134 U. S. 377 296
Greenwood *v.* Freight Co., 105 U. S. 13 165
Grisar *v.* McDowell, 6 Wall. 363 264
Gross *v.* U. S. Mtge. Co., 108 U. S. 477 143, 279
Groves *v.* Slaughter, 15 Pet. 449 292, 299
G. R. & B. Co. *v.* Smith, 128 U. S. 174 175, 176, 177
G. R. & I. Ry. *v.* Osborn, 193 U. S. 17 174, 175, 178
G. S. F. H. Co. *v.* Jones, 193 U. S. 532 240, 280
G. S. & L. S. *v.* Dormitzer, 192 U. S. 125 284, 286
Guarantee Co. *v.* Board of Liquidation, 105 U. S. 622 144
Gundling *v.* Chicago, 177 U. S. 183 322
Gunn *v.* Barry, 15 Wall. 610 138, 146
Gunnison County Comrs. *v.* Rollins, 173 U. S. 255 148, 149
Gut *v.* The State, 9 Wall. 35 186
Guthrie Nat. Bank *v.* Guthrie, 173 U. S. 528 256
Guy *v.* Baltimore, 100 U. S. 434 55, 87, 90, 302
G.-W. & W. Co. *v.* Keyes, 96 U. S. 199 206
G. & B. S. M. Co. *v.* Radcliffe, 137 U. S. 287 285
G. & S. I. R. *v.* Hewes, 183 U. S. 66 53, 140, 150, 162, 164, 165, 167

Hackett *v.* Ottawa, 99 U. S. 86 25
Hagan *v.* Lucas, 10 Pet. 400 267, 272

The references are to the pages.

Hagar *v.* Reclamation District, 111 U. S. 701 20, 277
Hagood *v.* Southern, 117 U. S. 52 260
Haines *v.* Carpenter, 91 U. S. 254 266
Hale *v.* Akers, 132 U. S. 554 224
v. Lewis, 181 U. S. 473 224
Hall *v.* De Cuir, 95 U. S. 485 78
v. Wisconsin, 103 U. S. 5 169
Hallinger *v.* Davis, 146 U. S. 314 274
Hamilton *v.* Dillin, 21 Wall. 73 18
v. V., S. & P. R., 119 U. S. 280 84
Hamilton Co. *v.* Massachusetts, 6 Wall. 632 45
Hammond *v.* Johnston, 142 U. S. 73 224
Hampton *v.* McConnel, 3 Wheat. 234 283
Hancock Nat. Bank *v.* Farnum, 176 U. S. 640 288
Hanford *v.* Davies, 163 U. S. 273 139, 140
Hanley *v.* Donoghue, 116 U. S. 1 230, 284
v. K. C. S. Ry., 187 U. S. 617 68, 102
Hanover Nat. Bank *v.* Moyses, 186 U. S. 181 138, 251, 274
Hans *v.* Louisiana, 134 U. S. 1 181, 205, 262, 263
Hans Nielsen, Petitioner, 131 U. S. 176 250
Hardin *v.* Jordan, 140 U. S. 371 72
Hare *v.* L. & N. R., 2 J. & H. Ch. 80 131
Harkrader *v.* Wadley, 172 U. S. 148 225, 266, 272
Harman *v.* Chicago, 147 U. S. 396 23, 87, 106
Harris *v.* Dennie, 3 Pet. 292 270
v. Hardeman, 14 How. 334 273, 284
Hartman *v.* Greenhow, 102 U. S. 672 169
Hauenstein *v.* Lynham, 100 U. S. 483 238
Havemeyer *v.* Iowa County, 3 Wall. 294 139
Haver *v.* Yaker, 9 Wall. 32 239
Hawaii *v.* Mankichi, 190 U. S. 197 12, 13
Hawker *v.* New York, 170 U. S. 189 185, 187
Hawthorne *v.* Calef, 2 Wall. 10 147
Hayburn's Case, 2 Dall. 409 221, 223
Hayes *v.* Missouri, 120 U. S. 68 320
v. Pratt, 147 U. S. 557 210
Hays *v.* P. M. S. S. Co., 17 How. 596 57, 103, 106
H. Bridge Co. *v.* Henderson City, 141 U. S. 679 140
v. Henderson City, 173 U. S. 592 278
Head *v.* A. Mfg. Co., 113 U. S. 9 277
v. University, 19 Wall. 526 180
Head Money Cases, The, 112 U. S. 580 23, 36, 40, 102, 238
Heidritter *v.* Elizabeth Oil-Cloth Co., 112 U. S. 294 272
Henderson *v.* Mayor of N. Y., 92 U. S. 259 57, 105, 237
Hennington *v.* Georgia, 163 U. S. 299 98
Hepburn *v.* Griswold, 8 Wall. 603 20
v. The School Directors, 23 Wall. 480 50, 51
H. F. I. Co. *v.* C., M. & St. P. Ry., 175 U. S. 91 210, 241, 243
H. G. L. Co. *v.* Hamilton City, 146 U. S. 258 148, 165, 175
Hibben *v.* Smith, 191 U. S. 310 277
Hickey's Lessee *v.* Stewart, 3 How. 750 284
H. I. Co. *v.* Augusta, 93 U. S. 116 53, 174
v. Morse, 20 Wall. 445 307
v. New York, 134 U. S. 594 45, 316
Higgins *v.* Butcher, Yelv. 89 208
Hills *v.* Exchange Bank, 105 U. S. 319 51
Hilton *v.* Guyot, 159 U. S. 113 281
Hine, The, *v.* Trevor, 4 Wall. 555 208, 209, 269
Hinson *v.* Lott, 8 Wall. 148 55, 92, 302
H. M. L. I. Co. *v.* Warren, 181 U. S. 73 320
Hobart *v.* Drogan, 10 Pet. 108 209, 266
Hodgson *v.* Vermont, 168 U. S. 262 274

The references are to the pages.

Holden *v.* Hardy, 169 U. S. 366 248, 274, 278, 298, 314, 319
v. Minnesota, 137 U. S. 483 187, 280
Holland *v.* Challen, 110 U. S. 15 243
Hollingsworth *v.* Virginia, 3 Dall. 378 258
Hollins *v.* B. C. & I. Co., 150 U. S. 371 243, 265
Holmes *v.* Jennison, 14 Pet. 540 191, 292, 299
v. Walton, 9 N. J. L. 427 233
Holt *v.* I. Mfg. Co., 176 U. S. 68 206, 270
Holyoke Co. *v.* Lyman, 15 Wall. 500 166
Home Ins. Co. *v.* Augusta, 93 U. S. 116 53, 174
v. New York, 134 U. S. 594 45
Hooe *v.* Jamieson, 166 U. S. 395 210
Hooker *v.* Burr, 194 U. S. 415 143, 146
v. Los Angeles, 188 U. S. 314 224, 276, 277
Hooper *v.* California, 155 U. S. 648 63, 304, 306
Hopkins *v.* McLure, 133 U. S. 380 224
v. U. S., 171 U. S. 578 67, 123, 125, 128
Hopt *v.* People, 104 U. S. 631 251
v. Utah, 110 U. S. 574 186, 251
v. Utah, 114 U. S. 488, 120 *id.* 430 251
Hornbuckle *v.* Toombs, 18 Wall. 648 9
Horner *v.* U. S., 143 U. S. 570 238
Hornthall *v.* The Collector, 9 Wall. 560 215
Houston *v.* Moore, 5 Wheat. 1 4, 217, 244, 268
Howard *v.* De Cordova, 177 U. S. 609 285
v. Fleming, 191 U. S. 126 224, 258, 322
v. U. S., 184 U. S. 676 206
Hoyt *v.* Sprague, 103 U. S. 613 299
H. S. M. Co. *v.* New York, 143 U. S. 305 304, 305, 306, 315
Hughes *v.* Edwards, 9 Wheat. 489 238
Huling *v.* K. V. Ry. & Imp. Co., 130 U. S. 559 277
Humphrey *v.* Pegues, 16 Wall. 244 162, 163, 167
Hunt *v.* Hunt, 131 U. S. clxv 148
v. Palao, 4 How. 589 223
Huntington *v.* Attrill, 146 U. S. 657 288
Hurtado *v.* California, 110 U. S. 517 274
Huse *v.* Glover, 119 U. S. 543 23, 84, 87
Hyatt *v.* People, 188 U. S. 691 195
Hyde *v.* Stone, 20 How. 170 210, 271
Hylton *v.* U. S., 3 Dall. 171 30, 34
H. & T. C. R. *v.* Texas, 177 U. S. 66 141, 148, 149, 190, 215, 232
H. & T. C. R. *v.* Texas, 170 U. S. 243 139, 161

I. C. C. *v.* A. M. Ry., 168 U. S. 144 110, 112
v. A., T. & S. F. R., 149 U. S. 264 110
v. Baird, 194 U. S. 25 113
v. Brimson, 154 U. S. 447 109, 110
v. B. & O. R., 145 U. S. 263 111
v. C., N. O. & T. P. Ry., 167 U. S. 479 110
v. D., G. H. & M. Ry., 167 U. S. 633 111
v. L. & N. R., 190 U. S. 273 113
I. C. R. *v.* Adams, 180 U. S. 28 263
v. Chicago, 176 U. S. 646 141
v. Decatur, 147 U. S. 190 24
v. Illinois, 146 U. S. 387 71, 148, 149
v. Illinois, 163 U. S. 142 99, 101
v. Illinois, 184 U. S. 77 71, 149
I. C. Ry. *v.* Iowa, 160 U. S. 389 273, 274, 276
I. C. & I. Co. *v.* Gibney, 160 U. S. 217 215
I. L. I. Co. *v.* Lewis, 187 U. S. 335 313, 318
Indiana *v.* Kentucky, 136 U. S. 479 211
In re Ayers, 123 U. S. 443 180, 261
Blake, 175 U. S. 114 267
Brown, 135 U. S. 701 143
Chapman, 166 U. S. 661 18
Converse, 137 U. S. 624 276
Cooper, 143 U. S. 472 228
Coy, 127 U. S. 731 296

The references are to the pages.

In re Debs, 158 U. S. 564 4, 126, 246, 274
Debs, 64 Fed. 724 126
Duncan, 139 U. S. 449 225, 282
Frederich, 149 U. S. 70 215, 225
Garnett, 141 U. S. 1 207, 243
Green, 134 U. S. 377 296
Hans Nielsen, 131 U. S. 176 250
Kemmler, 136 U. S. 436 257, 273, 298
Lennon, 166 U. S. 548 206
Lockwood, 154 U. S. 116 298
Loney, 134 U. S. 372 215, 225, 270
Manning, 139 U. S. 504 276, 322
McKenzie, Petitioner, 180 U. S. 536 250
Neagle, 135 U. S. 1 18, 19, 206, 215, 225, 266, 270
Quarles and Butler, 158 U. S. 532 19
Rahrer, 140 U. S. 545 96
Rapier, 143 U. S. 110 18, 309
Ross, 140 U. S. 453 19, 246
Shibuya Jugiro, 140 U. S. 291 313
Swan, 150 U. S. 637 250
Tyler, 149 U. S. 164 272
Watts and Sachs, 190 U. S. 1 266
Iowa *v.* Illinois, 147 U. S. 1 211
I. S. S. Co. *v.* Tinker, 94 U. S. 238 44, 75

Jackson *v.* Chew, 12 Wheat. 153 241
v. Lamphire, 3 Pet. 280 143
Ex parte, 96 U. S. 727 18
Jaehne *v.* New York, 128 U. S. 189 187
James *v.* Bowman, 190 U. S. 127 293
James Gray, The, *v.* The John Fraser, 21 How. 184 78, 100
Japanese Immigrant Case, 189 U. S. 86 19, 232, 251, 297
Jefferson Branch Bank *v.* Skelly, 1 Bl. 436 52, 141, 162, 175
Jennings *v.* C. R. C. Co., 147 U. S. 147 41, 43, 316
Johnson *v.* N. Y. L. I. Co., 187 U. S. 491 282
v. Powers, 139 U. S. 156 285, 288
Johnson *v.* Risk, 137 U. S. 300 224
v. Sayre, 158 U. S. 109 244, 247
Jones *v.* Andrews, 10 Wall. 327 215
v. Brim, 165 U. S. 180 274, 318
v. Soulard, 24 How. 41 71
v. U. S., 137 U. S. 202 216, 228
Joplin *v.* S. M. L. Co., 191 U. S. 150 175
Juilliard *v.* Greenman, 110 U. S. 421 4, 19, 21, 234
Justices, The, *v.* Murray, 9 Wall. 274 257

Kansas *v.* Colorado, 185 U. S. 125 212
Kansas Indians, 5 Wall. 737 45
Kate, The, 164 U. S. 458 208
Kauffman *v.* Wooters, 138 U. S. 285 273
Kearney, *Ex parte*, 7 Wheat. 38 250
Keith *v.* Clark, 97 U. S. 454 2, 138, 169
Kelley *v.* Rhoads, 188 U. S. 1 55, 57, 71
Kelly *v.* Pittsburgh, 104 U. S. 78 24, 247, 277
Kemmler, *In re*, 136 U. S. 436 257, 273, 298
Kendall *v.* U. S., 12 Pet. 521 229
Kennard *v.* Nebraska, 186 U. S. 304 206
Kennett *v.* Chambers, 14 How. 38 228
Kentucky *v.* Dennison, 24 How. 66 193, 194, 204, 213, 260
Kentucky R. Tax Cases, 115 U. S. 321 277, 316
Kepner *v.* U. S., 195 U. S. 100 251, 252
Keyes *v.* U. S., 109 U. S. 336 244
K. I. Co. *v.* Harbison, 183 U. S. 13 176, 279
Kidd *v.* Alabama, 188 U. S. 730 41, 306, 316
v. Pearson, 128 U. S. 1 278
Kilbourn *v.* Thompson, 103 U. S. 168 18
Kimmish *v.* Ball, 129 U. S. 217 81, 300
King *v.* Mullins, 171 U. S. 404 40, 277
v. Portland, 184 U. S. 61 24, 277
Kirby *v.* U. S., 174 U. S. 47 255

The references are to the pages.

Kirtland *v.* Hotchkiss, 100 U. S. 491 23, 41, 42
Knatchbull *v.* Hallett, 13 Ch. Div. 712 237
Knowles *v.* G. & C. Co., 19 Wall. 58 283, 287
Knowlton *v.* Moore, 178 U. S. 41 31, 36
Knox *v.* Exchange Bank, 12 Wall. 379 140
Koenigsberger *v.* R. S. M. Co., 158 U. S. 41 210
Kohl *v.* U. S., 91 U. S. 367 19
Koshkonong *v.* Burton, 104 U. S. 668 143, 146
K. P. R. *v.* A., T. & S. F. R., 112 U. S. 414 206
Kreiger *v.* Shelby R., 125 U. S. 39 140
Kring *v.* Missouri, 107 U. S. 221 184, 185
Krippendorf *v.* Hyde, 110 U. S. 276 273
K. W. Co. *v.* Knoxville, 189 U. S. 434 140, 178, 278
K. W. P. Co. *v.* G. B. & M. C. Co., 142 U. S. 254 215, 277, 278
K. & H. Bridge Co. *v.* Illinois, 175 U. S. 626 54 85
K. & W. R. *v.* Missouri, 152 U. S. 301 53, 150, 174

Laing *v.* Rigney, 160 U. S. 531 282
Lake County *v.* Graham, 130 U. S. 674 148, 149, 150
v. Rollins, 130 U. S. 662 139, 148, 149
Lammon *v.* Feusier, 111 U. S. 17 273
Lampasas *v.* Bell, 180 U. S. 276 206, 228
Landes *v.* Brant, 10 How. 348 283
Lane County *v.* Oregon, 7 Wall. 71 20
Lange, *Ex parte*, 18 Wall. 163 250, 252
Langford *v.* U. S., 101 U. S. 341 3
Lascelles *v.* Georgia, 148 U. S. 537 194
L. A. S. M. Co. *v.* U. S., 175 U. S. 423 228
Lawler *v.* Walker, 14 How. 149 215
Lawton *v.* Steele, 152 U. S. 133 274
L. C. Co. *v.* McCreery, 141 U. S. 475 272
L., C. & C. R. *v.* Letson, 2 How. 497 262, 303
League *v.* De Young, 11 How. 185 138, 143
v. Texas, 184 U. S. 156 40, 182, 183, 277
Leeper *v.* Texas, 139 U. S. 462 273, 282
Legal Tender Cases, 12 Wall. 457 19, 20, 232
Leigh *v.* Green, 193 U. S. 79 277
Leisy *v.* Hardin, 135 U. S. 100 69, 91, 94, 96, 100
Leloup *v.* Port of Mobile, 127 U. S. 640 56, 135
Lem Moon Sing *v.* U. S., 158 U. S. 538 19
Lennon, *In re*, 166 U. S. 548 206
Lent *v.* Tillson, 140 U. S. 316 276, 277
Leon *v.* Galceran, 11 Wall. 185 269
Leovy *v.* U. S., 177 U. S. 621 82, 84
Leroux *v.* Hudson, 109 U. S. 468 266
Lessee of Hickey *v.* Stewart, 3 How. 750 284
L. G. Co. *v.* C. G. Co., 115 U. S. 683 169
L. G. L. Co. *v.* Murphy, 170 U. S. 78 177
License Cases, 5 How. 504 65, 95, 100
License Tax Cases, 5 Wall. 462 26, 53, 70, 174
L. I. Co. *v.* French, 18 How. 404 284, 286, 306
v. Massachusetts, 10 Wall. 566 63, 303, 305, 306
Lincoln *v.* Power, 151 U. S. 436 265
Lincoln County *v.* Luning, 133 U. S. 529 262
Lionberger *v.* Rouse, 9 Wall. 468 49
Li Sing *v.* U. S., 180 U. S. 486 297
Livingston *v.* M. I. Co., 6 Cr. 274 229
v. Moore, 7 Pet. 469 182, 183
v. Story, 9 Pet. 632 243
L. I. W. Co. *v.* Brooklyn, 166 U. S. 685 176, 277
Lloyd *v.* Matthews, 155 U. S. 222 282
L., N. A. & C. Ry. *v.* L. T. Co., 174 U. S. 552 303, 305
L., N. O. & T. Ry. *v.* Mississippi, 133 U. S. 587 78, 98

The references are to the pages.

Loan Assn. *v.* Topeka, 20 Wall. 655 24
Locke *v.* New Orleans, 4 Wall. 172 183
Lockwood, *In re*, 154 U. S. 116 298
Loeb *v.* Columbia Township Trustees, 179 U. S. 472 139
Logan *v.* U. S., 144 U. S. 263 4, 19
Loney, *In re*, 134 U. S. 372 215, 225, 270
Looker *v.* Maynard, 179 U. S. 46 165
Lord *v.* S. S. Co., 102 U. S. 541 68, 207
Los Angeles *v.* L. A. W. Co., 177 U. S. 558 148, 169, 178
Lottawanna, The, 21 Wall. 558 207, 208, 243, 266
Lottery Case, 188 U. S. 321 64 119
Loughborough *v.* Blake, 5 Wheat. 317 9, 18, 27, 37
Louisiana *v.* Jumel, 107 U. S. 711 260, 261
v. Mayor of New Orleans, 109 U. S. 285 147, 148, 154, 275
v. New Orleans, 102 U. S. 203 144, 180
v. Pilsbury, 105 U. S. 278 148, 153, 155
v. Steele, 134 U. S. 230 260, 262
v. Texas, 176 U. S. 1 212
Low *v.* Austin, 13 Wall. 29 43, 88
Lowe *v.* Kansas, 163 U. S. 81 274, 318
L. S. & M. S. Ry. *v.* Ohio, 165 U. S. 365 83, 84
v. Ohio, 173 U. S. 285 99
v. Smith, 173 U. S. 684 101a, 278, 304, 313, 314
Luther *v.* Borden, 7 How. 1 228, 229, 327
Luxton *v.* N. R. Bridge Co., 153 U. S. 525 19
L. V. R. *v.* Pennsylvania, 145 U. S. 192 68, 104
L. W. Co. *v.* Clark, 143 U. S. 1 165
v. Easton, 121 U. S. 388 139, 140
Lyle *v.* Richards, 9 S. & R. 356 235
Lyng *v.* Michigan, 135 U. S. 161 91
L. & G. W. S. Co. *v.* P. I. Co., 129 U. S. 397 223, 229, 243
L. & J. F. Co. *v.* Kentucky, 188 U. S. 385 42, 277
L. & N. R. *v.* Behlmer, 175 U. S. 648 112
v. Eubank, 184 U. S. 27 101, 113
v. Kentucky, 161 U. S. 677 176
v. Kentucky, 183 U. S. 503 149, 175, 176, 177 178, 279, 313, 315, 321
v. Palmes, 109 U. S. 244 141
v. Schmidt, 177 U. S. 230 273, 274
v. Woodson, 134 U. S. 614 274
L. & P. Co. *v.* Mullen, 176 U. S. 126 23, 87, 89

Machine Co. *v.* Gage, 100 U. S. 676 55, 92, 302
Mackin *v.* U. S., 117 U. S. 348 247
Madrazzo, *Ex parte*, 7 Pet. 627 261
Mager *v.* Grima, 8 How. 490 22, 41
Magoun *v.* I. T. & S. Bank, 170 U. S. 283 40, 41, 316
Maguire *v.* Card, 21 How. 248 209
Mahon *v.* Justice, 127 U. S. 700 194
Maine *v.* G. T. Ry., 142 U. S. 217 55, 56, 103, 305
Mallett *v.* North Carolina, 181 U. S. 589 184, 187, 320
Manchester *v.* Massachusetts, 139 U. S. 240 72
Manning, *In re*, 139 U. S. 504 276, 322
Marbury *v.* Madison, 1 Cr. 137 3, 204, 220, 229, 231, 232, 234
Markuson *v.* Boucher, 175 U. S. 184 225
Marrow *v.* Brinkley, 129 U. S. 178 276
Marsh *v.* N., S. & Co., 140 U. S. 344 206, 270
Marshall *v.* B. & O. R., 16 How. 314 303
Marshall *v.* Holmes, 141 U. S. 589 19, 225
Martin *v.* B. & O. R., 151 U. S. 673 19, 225
v. Hunter's Lessee, 1 Wheat. 304 1, 2, 3, 7, 15, 19, 204, 205, 217, 218, 234, 265
v. Mott, 12 Wheat. 19 244
v. Waddell, 16 Pet. 367 71

The references are to the pages.

Maryland *v.* B. & O. R., 3 How. 534 170
Mason *v.* Haile, 12 Wheat. 370 143
v. Missouri, 179 U. S. 328 293
Ex parte, 105 U. S. 696 244
Massachusetts *v.* W. U. T. Co., 141 U. S. 40 54, 134
Matthew *v.* A. P. of N. Y., 136 N. Y. 333 125
Mattingly *v.* N. W. V. R., 158 U. S. 53 215
Mattox *v.* U. S., 156 U. S. 237 255
Maxwell *v.* Dow, 176 U. S. 581 234, 237, 274, 298, 311, 320, 322
v. Stewart, 22 Wall. 77 283, 284, 286
May *v.* New Orleans, 178 U. S. 496 88
Mayhew *v.* Thatcher, 6 Wheat. 129 284
Maynard *v.* Hill, 125 U. S. 190 148
Mayor *v.* Cooper, 6 Wall. 247 204, 206, 225
v. Lord, 9 Wall. 409 267
McAllister *v.* U. S., 141 U. S. 174 8, 9
McCall *v.* California, 136 U. S. 104 56, 105, 305
McClung *v.* Silliman, 6 Wheat. 598 270
McCracken *v.* Hayward, 2 How. 608 146
McCray *v.* U. S., 195 U. S. 27 26, 251
McCready *v.* Virginia, 94 U. S. 391 72, 299, 301, 302
McCulloch *v.* Maryland, 4 Wheat. 316 1, 3, 4, 15, 16, 17, 22, 48, 65, 237
McCullough *v.* Virginia, 172 U. S. 102 141, 169
McDonald *v.* Massachusetts, 180 U. S. 311 187, 317
McElmoyle *v.* Cohen, 13 Pet. 312 283
McElrath *v.* U. S., 102 U. S. 426 209, 255
McElvaine *v.* Brush, 142 U. S. 155 298
McGahey *v.* Virginia, 135 U. S. 662 169, 181, 263
McGuire *v.* The Commonwealth, 3 Wall. 387 47, 70
McKane *v.* Durston, 153 U. S. 684 301
McKenzie, Petitioner, *In re,* 180 U. S. 536 250
McKim *v.* Voorhies, 7 Cr. 279 270
McMillan *v.* McNeill, 4 Wheat. 209 147, 150, 152
McMillen *v.* Anderson, 95 U. S. 37 277
McNiel, *Ex parte,* 13 Wall. 236 76, 266
McNitt *v.* Turner, 16 Wall. 352 283
McNulty *v.* Batty, 10 How. 72 223
v. California, 149 U. S. 645 274
McPherson *v.* Blacker, 146 U. S. 1 296
M. C. P. & S. Co. *v.* Ins. Co. of N. A., 151 U. S. 368 112
Medley, Petitioner, 134 U. S. 160 185, 215, 225
Meigs *v.* McClung's Lessee, 9 Cr. 11 264
Memphis *v.* U. S., 97 U. S. 293 148, 153, 155
Memphis Bank *v.* Tennessee, 161 U. S. 186 53, 164, 174
Mercantile Bank *v.* New York, 121 U. S. 138 49, 50
Merchants & Manufacturers' Bk. *v.* Pennsylvania, 167 U. S. 461 41, 52, 277, 316
Meriwether *v.* Garrett, 102 U. S. 472 24, 148, 155
M. E. Ry. *v.* Minnesota, 134 U. S. 467 177, 278
Metcalf *v.* Watertown, 128 U. S. 586 206
Metropolitan Bank *v.* Claggett, 141 U. S. 520 224
M. G. Co. *v.* Shelby County, 109 U. S. 398 41, 53, 174
Middleton *v.* Mullica Township, 112 U. S. 433 25
Miller *v.* C. R., 168 U. S. 131 282
v. State, 15 Wall. 478 166
Milligan, *Ex parte,* 4 Wall. 2 244, 245, 250
Mills *v.* Brown, 16 Pet. 525 215
v. Duryee, 7 Cr. 481 283
v. Green, 159 U. S. 651 228
v. St. Clair County, 8 How. 581 175
Minder *v.* Georgia, 183 U. S. 559 274, 322
Minnesota *v.* Barber, 136 U. S. 313 81, 90, 237
v. Brundage, 180 U. S. 499 18, 225
v. Hitchcock, 185 U. S. 373 213
v. N. S. Co., 184 U. S. 199 213

The references are to the pages.

Minnesota *v.* N. S. Co., 194 U. S. 48 126, 215
Minor *v.* Happersett, 21 Wall. 162 293, 311
Minot *v.* P., W. & B. R., 18 Wall. 206 53, 56, 102
Mississippi *v.* Johnson, 4 Wall. 475 229
Mississippi Mills *v.* Cohn, 150 U. S. 202 243, 265
Missouri *v.* Andriano, 138 U. S. 496 204, 224
v. Dockery, 191 U. S. 165 41, 316
v. Harris, 144 U. S. 210 140
v. Illinois, 180 U. S. 208 212
v. Iowa, 7 How. 660 191, 211
v. Lewis, 101 U. S. 22 275, 322
v. Walker, 125 U. S. 339 169
Mitchell *v.* Clark, 110 U. S. 633 265
v. First Nat. Bank, 180 U. S. 471 282
v. Harmony, 13 How. 115 264
v. Smale, 140 U. S. 406 72, 206
M., K. & T. Ry. *v.* Haber, 169 U. S. 613 81
v. May, 194 U. S. 267 316
v. McCann, 174 U. S. 580 99
v. Missouri R. & W. Comrs., 183 U. S. 53 210
M. L. I. Co. *v.* McGrew, 188 U. S. 291 224
M. N. Co. *v.* U. S., 148 U. S. 312 253
Mobile *v.* Watson, 116 U. S. 289 148, 153, 155
Mogul S. S. Co. *v.* McGregor, 23 Q. B. D. 598 116
Montague *v.* Lowry, 193 U. S. 38 127
Montalet *v.* Murray, 4 Cr. 46 215
Montello, The, 20 Wall. 430 82, 209
Montgomery *v.* Portland, 190 U. S. 89 83
Moore *v.* Greenhow, 114 U. S. 338 145
v. Illinois, 14 How. 13 269
v. Missouri, 159 U. S. 673 275, 298, 317
v. U. S., 91 U. S. 270 235
Moran *v.* Horsky, 178 U. S. 205 224
v. New Orleans, 112 U. S. 69 57, 106
v. Sturges, 154 U. S. 256 208, 209, 269, 272
Morgan *v.* Louisiana, 93 U. S. 217 52, 148, 150, 164
Morgan *v.* Louisiana, 118 U. S. 455 24, 80
v. Parham, 16 Wall. 471 57, 106
Morley *v.* L. S. & M. S. Ry., 146 U. S. 162 144, 146, 148, 154, 278
Mormon Church *v.* U. S., 136 U. S. 1 9, 10, 19, 251, 309
Moses Taylor, The, 4 Wall. 411 205, 208, 209, 217, 218, 269
Motes *v.* U. S., 178 U. S. 458 255
M. P. Ry. *v.* Humes, 115 U. S. 512 100, 316
v. Mackey, 127 U. S. 205 100, 278, 304, 314, 315
v. Nebraska, 164 U. S. 403 278, 280
M. S. Co. *v.* Louisiana, 118 U. S. 455 24, 80
M. S. S. Co. *v.* McGregor, 23 Q. B. D. 598 116
M. T. Co. *v.* Mobile, 187 U. S. 479 2, 72, 149, 299
Mugler *v.* Kansas, 123 U. S. 623 100, 237, 278, 298
Muller *v.* Dows, 94 U. S. 444 215
Mumma *v.* The Potomac Co., 8 Pet. 281 175
Munn *v.* Illinois, 94 U. S. 113 98, 278, 315
Murdock *v.* Ward, 178 U. S. 139 31, 36
Murphy *v.* Ramsey, 114 U. S. 15 9, 187
Murray *v.* Charleston, 96 U. S. 432 53, 169
Murray's Lessee *v.* H. L. & I. Co., 18 How. 272 247, 250
Myrick *v.* M. C. R., 107 U. S. 102 242
M. & L. R. *v.* C. R., 66 N. H. 100 131
M. & M. Bank *v.* Pennsylvania, 167 U. S. 461 41, 52, 277, 316
M. & M. R. *v.* Ward, 2 Bl. 485 84
M. & O. R. *v.* Tennessee, 153 U. S. 486 52, 141, 162
M. & St. L. R. *v.* Minnesota, 186 U. S. 257 101b, 313, 315
v. Minnesota, 193 U. S. 53 100, 279
M. & St. L. Ry. *v.* Beckwith, 129 U. S. 26 100, 278, 304, 314, 316
v. Emmons, 149 U. S. 364 176, 316

The references are to the pages.

M. & St. L. Ry. *v.* Gardner, 177 U. S. 332 175
v. Herrick, 127 U. S. 210 278, 304, 314, 315

Nash *v.* Lull, 102 Mass. 60 270
Natal *v.* Louisiana, 139 U. S. 621 274, 321
Nathan *v.* Louisiana, 8 How. 73 55, 63
National Bank *v.* Chapman, 173 U. S. 205 49, 50
v. Commonwealth, 9 Wall. 353 47, 48
v. U. S., 101 U. S. 1 31
Nations *v.* Johnson, 24 How. 195 273, 285
N. B. Co. *v.* U. S., 105 U. S. 470 83
N. C. Ry. *v.* Maryland, 187 U. S. 258 53, 164, 165, 168, 174
N., C. & St. L. Ry. *v.* Alabama, 128 U. S. 96 24, 98, 246, 278
Neagle, *In re*, 135 U. S. 1 18, 19, 206, 215, 225, 266, 270
Neal *v.* Delaware, 103 U. S. 370 295
Nebraska *v.* Iowa, 145 U. S. 519 211
Nelson *v.* St. Martin's Parish, 111 U. S. 716 148, 153, 155
Nevada Bank *v.* Sedgwick, 104 U. S. 111 23
New Hampshire *v.* Louisiana, 108 U. S. 76 211, 261
New Jersey *v.* New York, 5 Pet. 284 211
v. Wilson, 7 Cr. 164 52, 161
v. Yard, 95 U. S. 104 52, 162, 163, 165
New Orleans *v.* Citizens' Bank, 167 U. S. 371 53, 167, 174
v. Morris, 105 U. S. 600 179
v. N. O. W. W., 142 U. S. 79 148, 170
v. Paine, 147 U. S. 261 229
v. Stempel, 175 U. S. 309 40, 41
Newton *v.* Commissioners, 100 U. S. 548 179
New York *v.* Barker, 179 U. S. 279 321
v. Connecticut, 4 Dall. 1 211
v. Eno, 155 U. S. 89 225
New York *v.* Knight, 192 U. S. 21 56, 104
v. Louisiana, 108 U. S. 76 211, 261
v. Miln, 11 Pet. 102 78, 79, 101
v. Roberts, 171 U. S. 658 54, 55, 304, 306, 315
v. Squire, 145 U. S. 175 176, 278, 317
New York Indians, 5 Wall. 761 45
N. F. & P. W. *v.* O. W. S. Co., 183 U. S. 216 206, 289
Nicol *v.* Ames, 173 U. S. 509 31, 36, 232
Nielsen, Petitioner, 131 U. S. 176 250
Nishimura Ekiu *v.* U. S., 142 U. S. 651 297
N. J. N. Co. *v.* Merchants' Bank, 6 How. 344 209
N. M. B. & L. Assn. *v.* Brahan, 193 U. S. 635 140, 224
N. M. R. *v.* Maguire, 20 Wall. 46 174
N., M. & Co. *v.* Ohio, 3 How. 720 97
Noble *v.* U. R. L. R., 147 U. S. 165 229
Nobles *v.* Georgia, 168 U. S. 398 274
N. O. C. & L. R. *v.* New Orleans, 143 U. S. 192 53, 174
v. New Orleans, 157 U. S. 219 142
N. O. F. Inspectors *v.* Glover, 160 U. S. 170 228
N. O. G. Co. *v.* L. L. Co., 115 U. S. 650 138, 169
North Carolina *v.* Temple, 134 U. S. 22 260, 262
Northern Securities Case, 193 U. S. 197 64, 67, 122, 124, 125, 127, 129, 131
Norton *v.* Board of Comrs. of Brownsville, 129 U. S. 479 148, 149
v. Shelby County, 118 U. S. 425 204, 232
Norwood *v.* Baker, 172 U. S. 269 24, 277, 316
N. O. W. Co. *v.* Louisiana, 185 U. S. 336 140
N. O. W. W. *v.* L. S. Co., 125 U. S. 18 140
v. Rivers, 115 U. S. 674 169
N. P. R. *v.* Amato, 144 U. S. 465 206

The references are to the pages.

N. P. R. *v.* Colburn, 164 U. S. 383 206
v. Myers, 172 U. S. 589 46
N. S. Co. *v.* U. S., 193 U. S. 197 64, 67, 122, 124, 125, 127, 129, 131
Nugent *v.* Boyd, 3 How. 426 268
Nutting *v.* Massachusetts, 183 U. S. 553 63, 304
N. W. Co. *v.* Newburyport, 193 U. S. 561 175
N. Y., L. E. & W. R. *v.* Pennsylvania, 153 U. S. 628 22, 23, 43, 176, 304
v. Pennsylvania, 158 U. S. 431 55, 103
N. Y. L. I. Co. *v.* Cravens, 178 U. S. 389 63, 304, 306
N. Y., N. H. & H. R. *v.* New York, 165 U. S. 628 99, 319
N. Y. & N. E. R. *v.* Bristol, 151 U. S. 556 165, 317
N. & W. R. *v.* Johnson, 15 Wall. 195 21
v. Pendleton, 156 U. S. 667 53, 168, 174, 175, 176, 178
v. Pennsylvania, 136 U. S. 114 56, 105, 304, 305
N. & W. Ry. *v.* Sims, 191 U. S. 441 55, 92

Oates *v.* Nat. Bank, 100 U. S. 239 242
Ochiltree *v.* R. Co., 21 Wall. 249 144
Ogden *v.* Saunders, 12 Wheat. 213 38, 147, 151, 153, 173, 182, 237
Ohio *v.* Dollison, 194 U. S. 445 247, 275, 298, 317
v. Thomas, 173 U. S. 276 18, 215, 225, 238, 270
O. I. Co. *v.* Daggs, 172 U. S. 557 279, 303, 304, 314, 319
Olcott *v.* The Supervisors, 16 Wall. 678 25, 139
O. L. I. & T. Co. *v.* Debolt, 16 How. 416 139, 141, 175, 242
O'Neil *v.* Vermont, 144 U. S. 323 257
O. O. Co. *v.* Indiana, 177 U. S. 190 278
O. P. Co. *v.* Aiken, 121 U. S. 444 23, 87
Orr *v.* Gilman, 183 U. S. 278 40, 41, 53, 166, 280, 316
Osborn *v.* Bank of the U. S., 9 Wheat. 738 17, 48, 206, 215, 228, 258, 264
v. Nicholson, 13 Wall. 654 310
Osborne *v.* County of Adams, 106 U. S. 181, 109 *id.* 1 24
v. Florida, 164 U. S. 650 56, 103
v. Mobile, 16 Wall. 479 135
Otis *v.* Parker, 187 U. S. 606 321
Ottawa *v.* Carey, 108 U. S. 110 25
v. National Bank, 105 U. S. 343 25
O. W. Co. *v.* Oshkosh, 187 U. S. 437 140, 143, 144
Owensboro *v.* O. W. S. Co., 191 U. S. 358 175, 177
Owensboro Nat. Bank *v.* Owensboro, 173 U. S. 664 51
Owings *v.* Hull, 9 Pet. 607 229, 283
v. Speed, 5 Wheat. 420 138
O. & M. R. *v.* Wheeler, 1 Bl. 286 215, 303, 304

Pace *v.* Alabama, 106 U. S. 583 315
v. Burgess, 92 U. S. 372 29, 73
Pacific Nat. Bank *v.* Mixter, 124 U. S. 721 270
Packet Co. *v.* Catlettsburg, 105 U. S. 559 23, 87
v. Keokuk, 95 U. S. 80 23, 87, 233
v. St. Louis, 100 U. S. 423 23, 87
Palmer *v.* McMahon, 133 U. S. 660 49, 50, 51, 277
Pana *v.* Bowler, 107 U. S. 529 242
Parish *v.* Ellis, 16 Pet. 451 243
Parkersburg *v.* Brown, 106 U. S. 487 24
Parkinson *v.* U. S., 121 U. S. 281 247
Parks, *Ex parte*, 93 U. S. 18 250
Parsons *v.* Bedford, 3 Pet. 433 243, 255, 256
v. C. & N. W. Ry., 167 U. S. 447 111, 112
Passaic Bridge Case, The, 3 Wall. 782 84
Passenger Cases, 7 How. 283 54, 57, 66, 105
Patterson *v.* Kentucky, 97 U. S. 501 65, 70
Patton *v.* Brady, 184 U. S. 608 31, 206

The references are to the pages.

Paul *v.* Virginia, 8 Wall. 168 63, 300, 303, 304, 305, 306
Paulsen *v.* Portland, 149 U. S. 30 277
Paup *v.* Drew, 10 How. 218 169
Payne *v.* Hook, 7 Wall. 425 210
P., C., C. & St. L. Ry. *v.* Backus, 154 U. S. 421 40, 57, 277
v. Board of Pub. Works, 172 U. S. 32 54, 85
P. Co. *v.* Adams, 189 U. S. 420 56, 103
See Packet Co.
Peake *v.* New Orleans, 139 U. S. 342 24
Peale *v.* Phipps, 14 How. 368 267, 272
Pearce *v.* Texas, 155 U. S. 311 195
Pearsall *v.* G. N. Ry., 161 U. S. 646 142, 149, 165, 176, 177
Pearson *v.* Yewdall, 95 U. S. 294 255, 277
Pease *v.* Peck, 18 How. 595 242
Peck *v.* Jenness, 7 How. 612 267, 272
Peete *v.* Morgan, 19 Wall. 581 44, 74, 81
Peik *v.* C. & N. W. Ry., 94 U. S. 164 98, 176
Pelton *v.* National Bank, 101 U. S. 143 51
Pennie *v.* Reis, 132 U. S. 464 179, 280
Penniman's Case, 103 U. S. 714 143
Pennoyer *v.* McConnaughy, 140 U. S. 1 263
v. Neff, 95 U. S. 714 249, 283, 285
Pennsylvania *v.* W. & B. Bridge Co., 9 How. 647, 11 *id.* 528 84
v. W. & B. Bridge Co., 13 How. 518 84, 239, 243
v. W. & B. B. Co., 18 How. 421 73, 83, 84
Pennsylvania College Cases, 13 Wall. 190 166
People *v.* C. G. T., 107 U. S. 59 57, 89, 105
v. Commissioners, 104 U. S. 466 56, 63
v. Commissioners of Taxes, 2 Bl. 620 44
v. Commissioners of Taxes, 94 U. S. 415 51, 52, 150
People *v.* Cook, 148 U. S. 397 53, 164, 165, 168, 174
v. The Commissioners, 4 Wall. 244 48
v. Weaver, 100 U. S. 539 50, 51
Pepke *v.* U. S., 183 U. S. 176 11, 27, 38
Permoli *v.* First Municipality, 3 How. 589 299
Perrine *v.* C. & D. C. Co., 9 How. 172 175
Pervear *v.* The Commonwealth, 5 Wall. 475 47, 70, 257
Petit *v.* Minnesota, 177 U. S. 164 320
P. Ex. Co. *v.* Seibert, 142 U. S. 339 41, 56
P. F. A. *v.* New York, 119 U. S. 110 63, 304, 305, 306
P. F. & M. I. Co. *v.* Tennessee, 161 U. S. 174 53, 166, 174
P. G. Co. *v.* North Carolina, 171 U. S. 345 89
P. G. & C. Co. *v.* Chicago, 194 U. S. 1 168, 176, 178
Phelps *v.* Holker, 1 Dall. 261 285
Philadelphia *v.* The Collector, 5 Wall. 720 225
Picard *v.* E. T., V. & G. R., 130 U. S. 637 53, 166, 168, 174
Pickard *v.* P. S. C. Co., 117 U. S. 34 58, 105
P. I. Co. *v.* Soule, 7 Wall. 433 31
v. Tennessee, 161 U. S. 193 52, 140, 150, 164, 174
Pierce *v.* Carskadon, 16 Wall. 234 146, 185, 188
v. Indseth, 106 U. S. 546 229
Pinney *v.* Nelson, 183 U. S. 144 140, 308
Planters' Bank *v.* Sharp, 6 How. 301 169
Pleasant Township *v.* A. L. I. Co., 138 U. S. 67 139, 141, 148, 149
Plessy *v.* Ferguson, 163 U. S. 537 280, 298, 310, 318
Plumley *v.* Massachusetts, 155 U. S. 461 47, 96
Plummer *v.* Coler, 178 U. S. 115 44, 45
P. M. Co. *v.* Pennsylvania, 125 U. S. 181 304, 305, 314, 315
Poindexter *v.* Greenhow.
See Virginia Coupon Cases.

The references are to the pages.

Polk's Lessee *v.* Wendell, 9 Cr. 87 240
Pollard *v.* Hagan, 3 How. 212 2, 72, 299
Pollock *v.* F. L. & T. Co., 157 U. S. 429 30, 34
v. F. L. & T. Co., 158 U. S. 601 34, 39, 233
Poole *v.* Fleeger, 11 Pet. 185 191
Pope *v.* Williams, 193 U. S. 621 292
Pound *v.* Turck, 95 U. S. 459 84
Powell *v.* Pennsylvania, 127 U. S. 678 315
P. P. C. Co. *v.* Hayward, 141 U. S. 36 103
v. Pennsylvania, 141 U. S. 18 22, 40, 57, 103
P. R. *v.* Maguire, 20 Wall. 36 52, 162
v. Miller, 132 U. S. 75 176, 177
v. Napier S. Co., 166 U. S. 280 209
Presser *v.* Illinois, 116 U. S. 252 233, 298
Prevost *v.* Greneaux, 19 How. 1 239
Prigg *v.* Pennsylvania, 16 Pet. 539 19, 204, 235, 292, 299
Prout *v.* Starr, 188 U. S. 537 263
Providence Bank *v.* Billings, 4 Pet. 514 41, 53, 174
Provident Inst. *v.* Massachusetts, 6 Wall. 611 45
Provident Inst. for Savings *v.* Jersey City, 113 U. S. 506 279
Provident Savings Society *v.* Ford, 114 U. S. 635 206
P. R. Removal Cases, 115 U. S. 1 206
P. T. C. Co. *v.* Adams, 155 U. S. 688 54, 134, 305
v. Alabama, 155 U. S. 482 210, 215, 221
v. Baltimore, 156 U. S. 210 24, 134
v. Charleston, 153 U. S. 692 56, 134
v. New Hope, 192 U. S. 55 24
v. Taylor, 192 U. S. 64 24, 134
P. T. Co. *v.* W. U. T. Co., 96 U. S. 1 62, 64, 134, 305
Public Clearing House *v.* Coyne, 194 U. S. 497 251
Pulliam *v.* Osborne, 17 How. 471 272
P. & S. C. Co. *v.* Bates, 156 U. S. 577 43, 55, 94, 104
v. Louisiana, 156 U. S. 590 54, 89
P. & S. S. S. Co. *v.* Pennsylvania, 122 U. S. 326 57, 65, 105

Quarles and Butler, *In re,* 158 U. S. 532 19
Queensbury *v.* Culver, 19 Wall. 83 25

Rahrer, *In re,* 140 U. S. 545 96
Ralls County Court *v.* U. S., 105 U. S. 733 148, 153, 155
Randall *v.* Kreiger, 23 Wall. 137 143
Rapier, *In re,* 143 U. S. 110 18, 309
Rash *v.* Farley, 159 U. S. 263 55, 92, 303
Rasmussen *v.* Idaho, 181 U. S. 198 81
Ratterman *v.* W. U. T. Co., 127 U. S. 411 56, 134
R. B. Co. *v.* Brister, 179 U. S. 445 92
R. Co. *v.* Alabama, 101 U. S. 832 180
v. County of Otoe, 16 Wall. 667 25
v. Ellerman, 105 U. S. 166 170
v. Falconer, 103 U. S. 821 154
v. Fuller, 17 Wall. 560 98, 113
v. Georgia, 98 U. S. 359 165
v. Hamersley, 104 U. S. 1 176
v. Hecht, 95 U. S. 168 142
v. Husen, 95 U. S. 465 81
v. Jackson, 7 Wall. 262 42
v. Koontz, 104 U. S. 5 305
v. Lockwood, 17 Wall. 357 242
v. McClure, 10 Wall. 511 138, 140
v. Mississippi, 102 U. S. 135 206
v. Nat. Bank, 102 U. S. 14 242
v. Richmond, 96 U. S. 521 101, 321
v. Rock, 4 Wall. 177 140, 215
v. Schurmeir, 7 Wall. 272 71
v. Tennessee, 101 U. S. 337 180, 181
See Ry. Co.

The references are to the pages.

R. Cos. *v.* Gaines, 97 U. S. 697 52, 53, 150, 164, 166, 167
Reagan *v.* F. L. & T. Co., 154 U. S. 362 101a, 177, 313, 315
v. M. T. Co., 154 U. S. 413 101a
Reetz *v.* Michigan, 188 U. S. 505 187, 278
Reggel, *Ex parte*, 114 U. S. 642 193, 195
Reid *v.* Colorado, 187 U. S. 137 81, 232
Relfe *v.* Rundle, 103 U. S. 222 308
Removal Cases, 100 U. S. 457 225
Renaud *v.* Abbott, 116 U. S. 277 284
Reynolds *v.* Stockton, 140 U. S. 254 285, 286
v. U. S., 98 U. S. 145 9, 254, 309
R. G. R. *v.* Gomila, 132 U. S. 478 272
Rhode Island *v.* Massachusetts, 12 Pet. 657 2, 191, 211, 234, 235
Rice *v.* R. Co., 1 Bl. 358 174
Richmond *v.* S. B. T. Co., 174 U. S. 761 134
Rider *v.* U. S., 178 U. S. 251 84
Ridings *v.* Johnson, 128 U. S. 212 243
Riggs *v.* Johnson County, 6 Wall. 166 267
Rippey *v.* Texas, 193 U. S. 504 317
Ritchie *v.* Mullen, 159 U. S. 235 281
Roanoke, The, 189 U. S. 185 208, 266
Ro Bards *v.* Lamb, 127 U. S. 58 274
Robb *v.* Connolly, 111 U. S. 624 195, 271
Robbins *v.* Shelby County, 120 U. S. 489 55, 69, 92, 93, 302
Roberts *v.* Reilly, 116 U. S. 80 195
v. U. S., 176 U. S. 221 229
Robertson *v.* Baldwin, 165 U. S. 275 218, 310
v. Cease, 97 U. S. 646 215
Robinson *v.* Campbell, 3 Wheat. 212 243
Roby *v.* Colehour, 146 U. S. 153 224
Rogers *v.* Alabama, 192 U. S. 226 295, 313, 319
v. Burlington, 3 Wall. 654 25
Roller *v.* Holly, 176 U. S. 398 273
Rose *v.* Himely, 4 Cr. 241 228, 284
Rosen *v.* U. S., 161 U. S. 29 254
Rosenblatt *v.* Johnston, 104 U. S. 462 48
Ross, *In re*, 140 U. S. 453 19, 246
Rothschild *v.* Knight, 184 U. S. 334 224
Royall *v.* Virginia, 116 U. S. 572, 121 *id.* 102 169
Ex parte, 117 U. S. 241 18, 225
R. R. *v.* C. V. R., 159 U. S. 630 224
Ruggles *v.* Illinois, 108 U. S. 526 176, 177
Rundle *v.* D. & R. C. Co., 14 How. 80 71
Runyan *v.* Coster, 14 Pet. 122 304, 305
R. W. Parsons, The, 191 U. S. 17 208, 209
Ry. Co. *v.* Philadelphia, 101 U. S. 528 53, 166
v. Whitton, 13 Wall. 270 208, 210, 215, 243, 266, 303
Ryder *v.* Holt, 128 U. S. 525 63
R. & A. R. *v.* P. T. Co., 169 U. S. 311 99
R. & G. R. *v.* Reid, 13 Wall. 269 52, 162, 163
R. & P. R. *v.* L. R., 13 How. 81 175

Salt Co. *v.* East Saginaw, 13 Wall. 373 164
Salt Lake City *v.* Tucker, 166 U. S. 707 256
Sands *v.* M. R. I. Co., 123 U. S. 288 23, 84, 87
Santa Clara County *v.* S. P. R., 118 U. S. 394 304, 314
Satterlee *v.* Matthewson, 2 Pet. 380 182, 183
Savings Society *v.* Multnomah County, 169 U. S. 421 22, 40, 41, 42
Sawyer *v.* Piper, 189 U. S. 154 206
Sayward *v.* Denny, 158 U. S. 180 215, 224
Schaefer *v.* Werling, 188 U. S. 516 316
Schick *v.* U. S., 195 U. S. 65 235, 246, 254
Schillinger *v.* U. S., 155 U. S. 163 209
Scholey *v.* Rew, 23 Wall. 331 31
Schollenberger *v.* Pennsylvania, 171 U. S. 1 96, 315

The references are to the pages.

Schurz *v.* Cook.
See People *v.* Cook.
S. Co. *v.* Chase, 16 Wall. 522 208
v. Joliffe, 2 Wall. 450 76
v. Portwardens, 6 Wall. 31 44, 57, 74, 106
Scotland County Court *v.* U. S., 140 U. S. 41 153, 155
Scott *v.* Donald, 165 U. S. 58 91, 96
v. Jones, 5 How. 343 138
v. McNeal, 154 U. S. 34 274
v. Neely, 140 U. S. 106 210, 243
v. Sandford, 19 How. 393 8, 215, 231, 291, 292
Scranton *v.* Wheeler, 179 U. S. 141 253
S. C. S. Ry. *v.* Sioux City, 138 U. S. 98 53, 165, 174
Scudder *v.* Comptroller, 175 U. S. 32 224
S. D. L. & T. Co. *v.* Jasper, 189 U. S. 439 101b, 278
v. National City, 174 U. S. 739 101b, 278
Searight *v.* Stokes, 3 How. 151 97
Seeberger *v.* McCormick, 175 U. S. 274 224
Seibert *v.* Lewis, 122 U. S. 284 155
Seneca Nation *v.* Christy, 162 U. S. 283 224
Sentell *v.* N. O. & C. R., 166 U. S. 698 280
S. F. et A. des E. U. *v.* Milliken, 135 U. S. 304 305
Shaw *v.* Covington, 194 U. S. 593 175
v. Robbins, 12 Wheat. 369 151, 153
Shelby County *v.* Union & Planters' Bank, 161 U. S. 149 53, 141, 162, 167, 174
Sherlock *v.* Alling, 93 U. S. 99 208
Shibuya Jugiro, *In re*, 140 U. S. 291 313
Shields *v.* Ohio, 95 U. S. 319 52, 150, 165, 174, 175, 178
Shively *v.* Bowlby, 152 U. S. 1 2, 72, 299
Shotwell *v.* Moore, 129 U. S. 590 44
Shreveport *v.* Cole, 129 U. S. 36 139
Shriver's Lessee *v.* Lynn, 2 How. 43 284
Shumate *v.* Heman, 181 U. S. 402 316
Siebold, *Ex parte*, 100 U. S. 371 296
Simmons *v.* Saul, 138 U. S. 439 283, 284
Simon *v.* Craft, 182 U. S. 427 273
Sinnot *v.* Davenport, 22 How. 227 77, 79, 101
Slaughter House Cases, 16 Wall. 36 290, 291, 298, 300, 310, 311, 314
Slocum *v.* Mayberry, 2 Wheat. 1 217, 270, 272, 273
S. L. & T. Co. *v.* Comptroller of New York, 177 U. S. 318 279
Smith *v.* Alabama, 124 U. S. 465 235, 237
v. Condry, 1 How. 28 282
v. Indiana, 191 U. S. 138 228
v. Maryland, 18 How. 71 71, 72, 299
v. McIver, 9 Wheat. 532 272
v. Reeves, 178 U. S. 436 262
v. S. L. & S. W. Ry., 181 U. S. 248 81
Smyth *v.* Ames, 169 U. S. 466 101a, 101b, 129, 263, 278, 304, 313, 314
v. Ames, 171 U. S. 361 101b, 315
Snyder *v.* Bettman, 190 U. S. 249 39
Society for Savings *v.* Coite, 6 Wall. 594 45
Sonnentheil *v.* M. B. Co., 172 U. S. 401 206
Soon Hing *v.* Crowley, 113 U. S. 703 237, 321
South Carolina *v.* Georgia, 93 U. S. 4 73, 85, 211
South Dakota *v.* North Carolina, 192 U. S. 286 211, 212, 261
S. P. Co. *v.* Denton, 146 U. S. 202 307
Spencer *v.* Merchant, 125 U. S. 345 24, 40, 277, 282
Spies *v.* Illinois, 123 U. S. 131 224, 275, 298
Spraigue *v.* Thompson, 118 U. S. 90 77, 233
Springer *v.* U. S., 102 U. S. 586 31, 34, 250
Springville *v.* Thomas, 166 U. S. 707 256
Sprott *v.* U. S., 20 Wall. 459 191
S. Ry. *v.* Allison, 190 U. S. 326 215, 303, 305

The references are to the pages.

S. S. Co. *v.* Joliffe, 2 Wall. 450 76
v. Portwardens, 6 Wall. 31 44, 57, 74, 106
S. S. R. Co. *v.* McClain, 192 U. S. 397 31
Stacy *v.* Thrasher, 6 How. 44 288
St. A. F. W. P. Co. *v.* St. Paul W. Comrs., 168 U. S. 349 2, 71
Stanislaus County *v.* S. J. & K. R. C. & I. Co., 192 U. S. 201 101b, 175, 176, 178, 278, 315
Stanley *v.* Schwalby, 162 U. S. 255 209
v. Supervisors, 121 U. S. 535 51
State *v.* Parkhurst, 9 N. J. L. 427 233
State Bank *v.* Knopp, 16 How. 369 141
State Freight Tax, 15 Wall. 232 22, 58, 65, 105
State Tax on Foreign-held Bonds, 15 Wall. 300 41, 42, 147
State Tax on Railway Gross Receipts, 15 Wall. 284 57, 105
State Tonnage Tax Cases, 12 Wall. 204 44, 74
St. Clair *v.* Cox, 106 U. S. 350 285, 286, 306
St. Clair County *v.* I. S. & C. T. Co., 192 U. S. 454 82
S. T. Co. *v.* B. R. Nat. Bank, 187 U. S. 211 210, 242
Steamship Co. *v.* Joliffe, 2 Wall. 450 76
Steamship Co. *v.* Portwardens, 6 Wall. 31 44, 57, 74, 106
Stearns *v.* Minnesota, 179 U. S. S. 223 52, 53, 141, 162, 164, 165
Stein *v.* B. W. S. Co., 141 U. S. 67 175
Stephens *v.* Cherokee Nation, 174 U. S. 445 184
Stevens *v.* Griffith, 111 U. S. 48 139
v. Nichols, 130 U. S. 230 215
St. J. & G. I. R. *v.* Steele, 167 U. S. 659 210, 215, 303
St. Lawrence, The, 1 Bl. 522 207, 209
St. L. C. C. Co. *v.* Illinois, 185 U. S. 203 280, 321
St. L., I. M. & St. P. Ry. *v.* Paul, 173 U. S. 404 319
St. Louis *v.* W. F. Co., 11 Wall. 423 41, 57, 82, 106
v. W. U. T. Co., 148 U. S. 92 24, 134
St. L. & S. F. Ry. *v.* Gill, 156 U. S. 649 53, 101a, 174, 175, 178, 278, 315
v. James, 161 U. S. 545 192, 210, 215, 303, 305
v. Mathews, 165 U. S. 1 176, 177, 278, 318
Stockard *v.* Morgan, 185 U. S. 27 55, 92
Stockdale *v.* I. Cos., 20 Wall. 323 184
Stone *v.* F. L. & T. Co., 116 U. S. 307 98, 101a, 176, 177
v. I. C. R., 116 U. S. 347 98, 177
v. Mississippi, 101 U. S. 814 178
v. N. O. & N. E. R., 116 U. S. 352 98
Storti *v.* Massachusetts, 183 U. S. 138 215, 225
St. P. G. L. Co. *v.* St. Paul, 181 U. S. 142, 139, 141
St. P., M. & M. Ry. *v.* Todd County, 142 U. S. 282 140
Strader *v.* Graham, 10 How. 93 292
Strauder *v.* West Virginia, 100 U. S. 303 295, 313
Streitwolf *v.* Streitwolf, 181 U. S. 179 286
Strother *v.* Lucas, 6 Pet. 763 229
Stuart *v.* Laird, 1 Cr. 299 234
Sturges *v.* Crowninshield, 4 Wheat. 122 2, 4, 63, 138, 142, 147, 150, 152, 159, 217, 235
St. T. W. W. *v.* N. O. W. W., 120 U. S. 64 169
Sully *v.* American Nat. Bank, 178 U. S. 289 303, 304, 319
Supervisors *v.* Durant, 9 Wall. 415 267
v. Stanley, 105 U. S. 305 50, 51
v. U. S., 154 U. S. 576 267
Suydam *v.* Broadnax, 14 Pet. 67 147, 151, 271
S. V. W. W. *v.* Schottler, 110 U. S. 347 177
Swafford *v.* Templeton, 185 U. S. 487 206, 293, 294
Swan, *In re*, 150 U. S. 637 250
Swift *v.* Tyson, 16 Pet. 1 242, 243

The references are to the pages.

S. W. W. Co. *v.* Skaneateles, 184 U. S. 354 169

Talbot *v.* S. C. First Nat. Bank, 185 U. S. 172 206
v. Seeman, 1 Cr. 1 229
Talton *v.* Mayes, 163 U. S. 376 247
Tappan *v.* Merchants' Nat. Bank, 19 Wall. 490 51
Tarble's Case, 13 Wall. 397 271
Tarrance *v.* Florida, 188 U. S. 519 313, 319
Taylor *v.* Carryl, 20 How. 583 272
v. Ypsilanti, 105 U. S. 60 25
Taylor and Marshall *v.* Beckham, 178 U. S. 548 280, 327
T. Co. *v.* Parkersburg, 107 U. S. 691 23, 87
v. Wheeling, 99 U. S. 273 54, 66, 82, 106
Teal *v.* Felton, 12 How. 284 268
Tel. Co. *v.* Texas, 105 U. S. 460 64
Tennessee *v.* Davis, 100 U. S. 257 205, 216, 225
v. P. S. C. Co., 117 U. S. 51 58, 105
v. Sneed, 96 U. S. 69 145
v. Union & Planters' Bank, 152 U. S. 454 215
v. Virginia, 177 U. S. 501 211
Terlinden *v.* Ames, 184 U. S. 270 228
Terrett *v.* Taylor, 9 Cr. 43 161
Terry *v.* Anderson, 95 U. S. 628 143
Ex parte, 128 U. S. 289 250, 254
Texas *v.* White, 7 Wall. 700 2, 213, 229, 327
The Albany Bridge Case.
See Albany Bridge Case.
The Belfast.
See Belfast, The.
The China.
See China, The.
Thomas *v.* Gay, 169 U. S. 264 238
v. U. S., 192 U. S. 363 31
Thomson *v.* P. R., 9 Wall. 579 47
Thompson *v.* Missouri, 171 U. S. 380 187
v. U. S., 155 U. S. 271 252
v. Utah, 170 U. S. 343 10, 185
v. Whitman, 18 Wall. 457 284, 287
Thorington *v.* Montgomery, 147 U. S. 490 247, 298
Thormann *v.* Frame, 176 U. S. 350 284
T. I. Co. *v.* Connecticut, 185 U. S. 364 300
Tiernan *v.* Rinker, 102 U. S. 123 55, 303
Timmons *v.* E. L. Co., 139 U. S. 378 215
Tinsley *v.* Anderson, 171 U. S. 101 225, 274, 322
Tomlinson *v.* Branch, 15 Wall. 460 53, 168
v. Jessup, 15 Wall. 454 165
Tonawanda *v.* Lyon, 181 U. S. 389 24, 273
Town of Venice *v.* Murdock, 92 U. S. 494 242
Townsend *v.* Todd, 91 U. S. 452 241
Trade Mark Cases, 100 U. S. 82 63, 233
Transportation Co. *v.* Parkersburg, 107 U. S. 691 23, 87
v. Wheeling, 99 U. S. 273 54, 66, 82, 106
Trask *v.* Maguire, 18 Wall. 391 52, 150, 164
Trevett *v.* Weeden, 2 Arnold, 525 233
Trigg *v.* Drew, 10 How. 224 169
Tucker *v.* Ferguson, 22 Wall. 527 46, 53, 166, 174
Tulare Irr. Dist. *v.* Shepard, 185 U. S. 1 148
Tullis *v.* L. E. & W. R., 175 U. S. 348 315
Tullock *v.* Mulvane, 184 U. S. 497 206
Turnbull *v.* Payson, 95 U. S. 418 289
Turner *v.* Maryland, 107 U. S. 38 44, 89
v. New York, 168 U. S. 90 279
v. Wilkes County Comrs., 173 U. S. 461 140, 243, 282
v. Williams.
See U. S. *v.* Williams.
Turnpike Co. *v.* State, 3 Wall. 210 175
Turpin *v.* Burgess, 117 U. S. 504 29, 73
v. Lemon, 187 U. S. 51 228, 277
Twin City Bank *v.* Nebeker, 167 U. S. 196 23, 40
Twitchell *v.* The Commonwealth, 7 Wall. 321 224, 254

The references are to the pages.

Tyler *v.* Judges of Court of Registration, 179 U. S. 404 228
In re, 149 U. S. 164 272
T. & P. Ry. *v.* Cody, 166 U. S. 606 206
v. Cox, 145 *id.* 593 243
v. I. C. C., 162 U. S. 197 109, 112

University *v.* People, 99 U. S. 309 52, 140, 162, 163
U. P. R. *v.* Peniston, 18 Wall. 5 47
Upshur County *v.* Rich, 135 U. S. 467 228
U. R. *v.* City of New York, 193 U. S. 416 148
U. R. T. Co. *v.* Lynch, 177 U. S. 149 40, 54, 57, 103
Urtetiqui *v.* D'Arbel, 9 Pet. 692 288
U. S. *v.* Amedy, 11 Wheat. 392 282
v. Arredondo, 6 Pet. 691 239
v. Ball, 163 U. S. 662 251, 252
v. B. B. B. Co., 176 U. S. 211 83, 84
v. Bevans, 3 Wheat. 336 73, 216
v. Black, 128 U. S. 40 229
v. Blaine, 139 U. S. 306 229
v. Burr, 4 Cr. 470 235
v. B. & O. R., 17 Wall. 322 39
v. Coolidge, 1 Wheat. 415 216, 239
v. Cruikshank, 92 U. S. 542 217, 291, 294, 309
v. De Walt, 128 U. S. 393 247
v. Dewitt, 9 Wall. 41 70, 216
v. E. C. Knight Co., 156 U. S. 1 67, 128, 131
v. Ferreira, 13 How. 40 223
v. Fisher, 2 Cr. 358 18
v. Forty-three Gallons of Whiskey, 93 U. S. 188 136, 238
v. Fox, 94 U. S. 315 298
v. Fox, 95 U. S. 670 186, 216, 217
v. G. E. Ry., 160 U. S. 668 19, 232
v. Haas, 3 Wall. 407 135
v. Hall, 98 U. S. 343 18
v. Hamilton, 3 Dall. 17 250
v. Harris, 106 U. S. 629 3, 232, 233, 310, 322
v. Holliday, 3 Wall. 407 135
U. S. *v.* Hudson, 7 Cr. 32 216, 220, 239
v. Isham, 17 Wall. 506 132
v. J. T. A., 171 U. S. 505 67, 122, 123, 124, 125, 127, 129
v. Jung Ah Lung, 124 U. S. 621 297
v. Keehler, 9 Wall. 83 191
v. Le Bris, 121 U. S. 278 136
v. Lee, 106 U. S. 196 264
v. Lee Yen Tai, 185 U. S. 213 238
v. Lynah, 188 U. S. 445 253
v. Marigold, 9 How. 560 18, 269
v. Memphis, 97 U. S. 284 179
v. Michigan, 190 U. S. 379 209, 213
v. M. R. Co., 189 U. S. 391 72, 299
v. New Orleans, 98 U. S. 381 24
v. North Carolina, 136 U. S. 211 209
v. Ortega, 11 Wheat. 467 206, 220
v. P.-D. M. Co., 176 U. S. 317 266
v. Perez, 9 Wheat. 579 251
v. Perkins, 163 U. S. 625 42, 45
v. Perot, 98 U. S. 428 230
v. Peters, 3 Dall. 121 221
v. Peters, 5 Cr. 115 263, 266
v. Reese, 92 U. S. 214 217, 293
v. Reid, 12 How. 361 265
v. R. G. D. & I. Co., 174 U. S. 690 84
v. Rice, 4 Wheat. 246 26
v. Rickert, 188 U. S. 432 46
v. Schooner Peggy, 1 Cr. 103 238
v. Schurz, 102 U. S. 378 229
v. Singer, 15 Wall. 111 31
v. Sing Tuck, 194 U. S. 161 225, 297
v. Texas, 143 U. S. 621 228, 265
v. T. M. F. A., 166 U. S. 290 67, 112, 123, 125, 127, 129
v. U. P. R., 91 U. S. 72 236
v. Waddell, 112 U. S. 76 19, 250
v. Williams, 194 U. S. 279 251, 254, 309

The references are to the pages.

U. S. *v.* Windom, 137 U. S. 636 229
v. Wong Kim Ark, 169 U. S. 649 235, 291, 297, 298
v. Zucker, 161 U. S. 475 254

Van Allen *v.* The Assessors, 3 Wall. 573 48, 49
Van Brocklin *v.* Tennessee, 117 U. S. 151 46
Vance *v.* Vance, 108 U. S. 514 143
v. W. A. V. Co., 170 U. S. 438 90
Van Hoffman *v.* Quincy, 4 Wall. 552 145
Van Horne's Lessee *v.* Dorrance, 2 Dall. 304 204
Vaughan *v.* Northup, 15 Pet. 1 267
Veazie Bank *v.* Fenno, 8 Wall. 533 17, 31, 40
v. Moor, 14 How. 568 78, 85
Venice *v.* Murdock, 92 U. S. 494 242
Vicksburg *v.* Tobin, 100 U. S. 430 23, 87
Virginia *v.* Rives, 100 U. S. 313 295, 313
v. Tennessee, 148 U. S. 503 192, 211
v. West Virginia, 11 Wall. 39 191, 192, 211
Virginia Coupon Cases, 114 U. S. 269 169, 190, 233, 264
Virginia, *Ex parte,* 100 U. S. 339 295, 313
Voight *v.* Wright, 141 U. S. 62 90, 91
Voigt *v.* Detroit, 184 U. S. 115 24, 277
Voorhees *v.* Bank of the U. S., 10 Pet. 449 284
V. W. Co. *v.* Vicksburg, 185 U. S. 65 206

Wadsworth *v.* Supervisors, 102 U. S. 534 148, 149
Wagonner *v.* Flack, 188 U. S. 595 141, 142
Waite *v.* Dowley, 94 U. S. 527 52
v. Santa Cruz, 184 U. S. 302 148
Wales *v.* Stetson, 2 Mass. 146 165
v. Whitney, 114 U. S. 564 244
Walker *v.* Sauvinet, 92 U. S. 90 255, 274
Walker *v.* Whitehead, 16 Wall. 314 146
Wall, *Ex parte,* 107 U. S. 265 247
Walla Walla *v.* W. W. W. Co., 172 U. S. 1 139, 169
Wallace *v.* McConnell, 13 Pet. 136 271, 272
Walling *v.* Michigan, 116 U. S. 446 55, 91, 302
Walsh *v.* C., H. V. & A. R., 176 U. S. 469 141
Walston *v.* Nevin, 128 U. S. 578 277, 316
Ward *v.* Maryland, 12 Wall. 418 55, 90, 302
Waring *v.* Clarke, 5 How. 441 209, 217
v. The Mayor, 8 Wall. 110 88
Warner *v.* S. & H. Co., 191 U. S. 195 63
Watson *v.* Jones, 13 Wall. 679 266
v. Mercer, 8 Pet. 88 182, 183
Watts and Sachs, *In re,* 190 U. S. 1 266
Wayman *v.* Southard, 10 Wheat. 1 265
W. B. Co. *v.* Hatch, 125 U. S. 1 84
Webber *v.* Virginia, 103 U. S. 344 47, 55, 90, 302
Weber *v.* Harbor Comrs., 18 Wall. 57 71, 72, 299
v. Rogan, 188 U. S. 10 148
Webster *v.* Cooper, 14 How. 488 241
v. Reid, 11 How. 437 285
Wedding *v.* Meyler, 192 U. S. 573 285
Welch *v.* Cook, 97 U. S. 541 164
Wells *v.* Savannah, 181 U. S. 531 52, 53, 166
Wells, *Ex parte,* 18 How. 307 250
Welton *v.* Missouri, 91 U. S. 275 55, 69, 90, 302
Werlein *v.* New Orleans, 177 U. S. 390 289
West *v.* Aurora City, 6 Wall. 139 225
v. Louisiana, 194 U. S. 258 275
Weston *v.* Charleston, 2 Pet. 449 44
Weyerhaeuser *v.* Minnesota, 176 U. S. 550 277
W. F. Co. *v.* East St. Louis, 107 U. S. 365 53, 54, 66, 82, 106, 166

The references are to the pages.

Wharton *v.* Wise, 153 U. S. 155 192
Wheaton *v.* Peters, 8 Pet. 591 239, 243
Wheeler *v.* Jackson, 137 U. S. 245 143, 279
Whitbeck *v.* Mercantile Bank, 127 U. S. 193 51
White *v.* Hart, 13 Wall 646 2, 138, 146, 310
v. Schloerb, 178 U. S. 542 272
Whitehead *v.* Shattuck, 138 U. S. 146 255
Whitman *v.* Oxford Nat. Bank, 176 U. S. 559 288
Whitney *v.* Robertson, 124 U. S. 190 238
Whitten *v.* Tomlinson, 160 U. S. 231 195, 225
Wickliffe *v.* Owings, 17 How. 47 215
Wight *v.* Davidson, 181 U. S. 371 251
v. U. S., 167 U. S. 512 111
Wilcox *v.* Jackson, 13 Pet. 498 264, 284
Wiley *v.* Sinkler, 179 U. S. 58 293, 294
Wilkerson *v.* Utah, 99 U. S. 130 257
Wilkes County *v.* Coler, 180 U. S. 506 139, 140, 282
Wilkes County Comrs. *v.* Coler, 190 U. S. 107 25
Williams *v.* Benedict, 8 How. 107 267, 272
v. Bruffy, 96 U. S. 176 139, 191
v. Fears, 179 U. S. 270 56, 320
v. Heard, 140 U. S. 529 224, 268
v. Louisiana, 103 U. S. 637 141
v. Mississippi, 170 U. S. 213 313, 319
v. Parker, 188 U. S. 491 278
v. Wingo, 177 U. S. 601 168, 175
Williamson *v.* Berry, 8 How. 495 284
v. New Jersey, 130 U. S. 189 170
v. Suydam, 6 Wall. 723 143
Willson *v.* The B. B. C. M. Co., 2 Pet. 245 84
Wilson *v.* Eureka City, 173 U. S. 32 280, 322
v. Iseminger, 185 U. S. 55 143
Wilson *v.* Lambert, 168 U. S. 611 251
v. McNamee, 102 U. S. 572 76
v. North Carolina, 169 U. S. 586 280
v. Standefer, 184 U. S. 399 141
Ex parte, 114 U. S. 417 247
Wiscart *v.* Dauchy, 3 Dall. 321 223
Wisconsin *v.* Duluth, 96 U. S. 379 85, 211
v. P. I. Co., 127 U. S. 265 212, 213, 288
Wise *v.* Withers, 3 Cr. 331 244
Wiswall *v.* Sampson, 14 How. 52 267, 272
Withers *v.* Buckley, 20 How. 84 85, 247
Witherspoon *v.* Duncan, 4 Wall. 210 40
W., M. & P. R. *v.* Jacobson, 179 U. S. 287 100
Wolff *v.* New Orleans, 103 U. S. 358 148, 153, 155
Wong Wing *v.* U. S., 163 U. S. 228, 238, 251, 254, 297
Wood *v.* Brady, 150 U. S. 18 140
Woodruff *v.* Mississippi, 162 U. S. 291 141, 148
v. Parham, 8 Wall. 123 28, 29, 54, 64, 73, 88, 90, 94, 104, 106
v. Trapnall, 10 How. 190 169
Worcester *v.* Georgia, 6 Pet. 515 135, 224
Workman *v.* New York, 179 U. S. 552 206, 209
W. P. O. Co. *v.* Texas, 177 U. S. 28 304
W. P. S. C. *v.* Casperson, 193 U. S. 189 298
W. R. *v.* Defiance, 167 U. S. 88 176, 177, 280
Wright *v.* M. M. L. I. Co., 193 U. S. 657 165
Wright *v.* Nagle, 101 U. S. 791 141, 175
W., S. L. & P. Ry. *v.* Illinois, 118 U. S. 557 101, 113
Wurts *v.* Hoagland, 114 U. S. 606 277
W. U. T. Co. *v.* A. A. R., 178 U. S. 239 206, 215
v. Alabama, 132 U. S. 472 56, 135
v. C. P. Co., 181 U. S. 92 210, 239, 243

The references are to the pages.

W. U. T. Co. *v.* Indiana, 165 U. S. 304 35, 40
v. James, 162 U. S. 650 64, 134
v. Massachusetts, 125 U. S. 530 40, 57, 135
v. Missouri, 190 U. S. 412 40, 57, 103, 134
v. New Hope, 187 U. S. 419 24, 134
v. Pendleton, 122 U. S. 347 134
v. Taggart, 163 U. S. 1 22, 40, 54, 57, 134
v. Texas, 105 U. S. 460 44, 58, 134
Wynehamer *v.* The People, 13 N. Y. 428 10
W. & B. Bridge Co. *v.* W. B. Co., 138 U. S. 287 175, 176
W. & M. Ry. *v.* Powers, 191 U. S. 379 164
W. & St. P. L. Co. *v.* Minnesota, 159 U. S. 526 53, 166, 167, 277
W. & St. P. R. *v.* Blake, 94 U. S. 180 176
W. & W. R. *v.* Alsbrook, 146 U. S. 279 52, 53, 162, 166, 168, 174
v. King, 91 U. S. 3 146
v. Reid, 13 Wall. 264 52, 162

Yarbrough, *Ex parte*, 110 U. S. 651 18, 19, 250, 293, 296
Yick Wo *v.* Hopkins, 118 U. S. 356 311, 312
York *v.* Texas, 137 U. S. 15 273
Young *v.* Clarendon Township, 132 U. S. 340 25
v. Parker, 132 U. S. 267 225
Y. & M. V. R. *v.* Thomas, 132 U. S. 174 53, 166
Y. & M. V. Ry. *v.* Adams, 180 U. S. 1 224

Zane *v.* Hamilton County, 189 U. S. 370 148, 149

CHAPTER I.

THE RELATION OF THE STATES AND OF THE TERRITORIES TO THE UNITED STATES AND TO EACH OTHER.

1. The sanction of the Constitution.
2. The indissolubility of the Union.
3. The autonomy of the states.
4. The delegated character and limited powers of the government of the United States.
5. The federal supremacy.
6. The restraints upon the states.
7. The force and effect of the preamble to the Constitution.
8. The territories.

The sanction of the Constitution.

1. The Constitution, though framed by a convention whose members were elected by the legislatures of the states, was ratified in the several states by conventions whose members were elected by the people of their respective states. It derives its whole authority from that ratification, and when thus adopted, it was of complete obligation and it thenceforth bound the states, and the citizens of each state.[1]

The indissolubility of the Union.

2. The union of the states under the Constitution was, from and after the ratification of that instrument, indissoluble, and, until an amendment be adopted, authorizing a dissolution of the union, or a withdrawal of a state from the union, it is not possible for a state, without violating the constitutional compact, to withdraw from the union, or to deprive itself of its rights as one of the

[1] Martin *v.* Hunter's Lessee, 1 Wheat. 304, 324; McCulloch *v.* Maryland, 4 Wheat. 316, 404. See also Downes *v.* Bidwell, 182 U. S. 251, 285, 359, 376.

United States, or to emancipate itself from the restraints imposed by the Constitution on freedom of state action.[2]

The autonomy of the states.

3. The thirteen original states were existing governments when the Constitution was ratified; and states admitted to the union under the Constitution have as regards the United States and the other states, in all respects in which the effect of that instrument has not been changed by amendment, the same rights, powers and obligations as the thirteen original states.[3] Therefore, in so far as the states are not controlled by the expressed or implied restrictions contained in the Constitution of the United States, they may severally exercise all the powers of independent governments.[4] The states, though united under the sovereign authority of the Constitution, are, so far as their freedom of action is not controlled by that instrument, foreign to and independent of each other.[5]

The delegated character and limited powers of the federal government.

4. The government of the United States, in its relation to the several states and to the citizens of those states, is one of delegated and limited powers, which are expressly or by necessary implication granted by its

[2] Texas *v.* White, 7 Wall. 700; White *v.* Hart, 13 Wall. 646; Keith *v.* Clark, 97 U. S. 454.

[3] Pollard *v.* Hagan, 3 How. 212; Texas *v.* White, 7 Wall. 700; Shively *v.* Bowlby, 152 U. S. 1; St. A. F. W. P. Co. *v.* St. Paul W. Comrs., 168 *id.* 349; Bolln *v.* Nebraska, 176 *id.* 83; M. T. Co. *v.* Mobile, 187 *id.* 479.

[4] Amendments to the Constitution, Articles IX and X; Martin *v.* Hunter's Lessee, 1 Wheat. 304, 325; Sturges *v.* Crowninshield, 4 Wheat. 193; Texas *v.* White, 7 Wall. 700, 721.

[5] Buckner *v.* Finley, 2 Pet. 586, 590; Rhode Island *v.* Massachusetts, 12 Pet. 722.

written Constitution.[6] The Constitution has created a government, divided into three departments, legislative, executive and judicial. As the chief function of the executive department, apart from its participation in legislation by the exercise of a qualified veto, is that of administering the laws of Congress, and as the primary duty of the judicial department is that of expounding the Constitution and the laws in their application to subject-matters of judicial cognizance, either civil or criminal, it is obvious that the powers conferred by the Constitution upon the government of the United States are, in the main, powers of legislation. The powers granted by the Constitution to the government of the United States are either expressed or implied. The expressed powers are those which are specifically stated in the Constitution. The implied powers are those which authorize the use of appropriate means, which are consistent with the letter and spirit of the Constitution, for the accomplishment of legitimate ends, which are not prohibited, and which are within the scope of the Constitution.[7] The powers granted by the Constitution to the United States are subject to certain expressed exceptions, which are, in the main, contained in the 9th section of Article I of the Constitution and in the first eleven of its amendments.

The federal supremacy.

5. Article VI of the Constitution declares that "this Constitution and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United

[6] Martin *v.* Hunter's Lessee, 1 Wheat. 304, 326; Marbury *v.* Madison, 1 Cr. 137, 176; Briscoe *v.* Bank of Kentucky, 11 Pet. 317; U. S. *v.* Harris, 106 U. S. 629; Langford *v.* U. S., 101 *id.* 341.

[7] *Infra,* Chapter II; Constitution, Article I, Section 8; McCulloch *v.* Maryland, 4 Wheat. 421.

States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding.'' By force of this constitutional provision, the government of the United States, as Marshall, C. J., said in McCulloch *v.* Maryland,[8] ''though limited in its powers, is supreme within its sphere of action,'' and to the extent, and in the exercise, of the powers delegated to it, it is a sovereignty.[9]

The restraints upon the states.

6. The restraints imposed by the Constitution upon the states are either expressed or implied. The expressed restraints are those which are specifically stated in the Constitution. The implied restraints are those which result from the express grant by the Constitution of certain powers whose nature, or the terms of whose grant, require that they should be exclusively exercised by the United States.[10] The expressed restraints are, *first,* those which affect the relations of the several states to other states, foreign and domestic; and, *second,* those which have reference to the relations between the states and their citizens, and which limit the exercise by the states of their powers of legislation. The expressed restraints of the first class include the prohibition of treaties, alliances, confederations, agreements, or compacts with another state or with a foreign power; the obligation not to issue letters of *marque* and reprisal, or to maintain troops or ships of war in times of peace, or

[8] Wheat. 316, 405.

[9] Alexander Hamilton's argument of 23d Fedruary, 1791, as to the constitutionality of a national bank. 3 Lodge's Hamilton's Works, 181; Juilliard *v.* Greenman, 110 U. S. 421; Logan *v.* U. S., 144 *id.* 263; *In re* Debs, 158 *id.* 564; Downes *v.* Bidwell, 182 *id.* 288.

[10] Sturges *v.* Crowninshield, 4 Wheat. 122, 193; Houston *v.* Moore, 5 *id.* 49; Gilman *v.* Philadelphia, 3 Wall. 713.

to engage in war unless actually invaded or in such imminent danger as will not admit of delay; the requirements that full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state, and that the citizens of each state shall be entitled to all the privileges and immunities of citizens of the several states, and that fugitives from justice shall be surrendered from one state to another. The expressed restraints of the second class include the prohibition of the grant of titles of nobility, of the coinage of money, of the emission of bills of credit, of the establishment of any legal tender other than gold and silver coin, of the imposition of duties of tonnage and duties on imports or exports, excepting such as may be absolutely necessary for the execution of inspection laws; of the rehabilitation of slavery or involuntary servitude, except as a punishment for crime; of the deprivation of any person of life, liberty, or property without due process of law; of the denial to any person of the equal protection of the law; of disfranchisement on account of race, colour, or previous condition of servitude, or for any cause, except for participation in rebellion or other crime, of any of the male inhabitants of a state who are twenty-one years of age and citizens of the United States; of the election or the appointment to office under a state of any person "who, having previously taken an oath, as a member of Congress, or as a member of any state legislature, or as an executive or judicial officer of any state, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof," and whose disabilities shall not have been removed by a vote of two-thirds of each house of Congress; of the assumption or payment of any debt or obligation incurred in aid of insurrection or rebellion against the United States, or of

any claim for the loss or emancipation of any slave; and of the enactment of bills of attainder, *ex post facto* laws, or laws impairing the obligation of contracts.

The implied restraints limit the action of the states with regard to taxation, the regulation of commerce, and the personal and property rights of their citizens, and of the citizens of other states.

Many of the restraints are so clear in their terms, and so little require judicial construction, that no question has ever been raised as to their legal effect, but others of those restraints have been frequently subjects of litigation. For the purposes of this treatise it is unnecessary to make further reference to the restraints with regard to the issue of letters of *marque* or reprisal, the maintenance of troops or ships of war in time of peace, the engagement in war unless actually invaded or in such imminent danger as will not admit of delay, the grant of titles of nobility, or the coinage of money. As, happily for the peace and prosperity of the country, slavery is of past, and not of present, interest, it is not deemed necessary to refer to that subject further than to note that the XIII Amendment has abolished it in every form, and forbidden its re-establishment.

The force and effect of the preamble to the Constitution.

7. The preamble to the Constitution declares that "We, the people of the United States, in order to form a more perfect union, establish justice, insure domestic tranquillity, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America." That the true significance of that declaration may be understood, it must be remembered that the people, whose ratification of the instrument gave it its legal

validity, were citizens of independent states, which had been theretofore bound together in a confederation, and which were thenceforth to be united under a government which, though limited in its action by the reservation to the several states of all powers not delegated to the United States, should yet be supreme within its defined bounds.[11]

Therefore, the government created by the Constitution is, to the extent of the powers vested in that government, national in its character, and, by force of the rights reserved to the states, it is also a league of sovereign and independent states; and every citizen of each state, while owing allegiance to his state in all matters not controlled by the powers granted to the United States, owes also a paramount allegiance to the United States in all that is made by the Constitution of federal obligation. In view of this dual, and yet undivided, allegiance due by those who are citizens of the United States and also citizens of a state, it was, in the hour of its formation, and it has ever since been, essential to the right administration of the government of the United States under the Constitution that there should be a clear appreciation of the complex character of that government and a careful maintenance of the balance of power as between the government of the United States and the governments of the several states.

The territories.

8. The Constitution[12] dealt with the territory owned at the time of its adoption and with future acquisitions of territory, by providing that "new states may be admitted by the Congress into the Union," and that[13] "the Con-

[11] Martin *v.* Hunter's Lessee, 1 Wheat. 304, 325.
[12] Art. IV, Sec. 3, Par. 1.
[13] Art. IV, Sec. 3, Par. 2.

gress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States." In Dred Scott *v.* Sandford[14] the court held that the power of making rules and regulations was intended to operate only in the territory belonging to the United States in 1787, and not to extend to subsequently acquired territory; but that narrow view is inconsistent with the judgment in the earlier case of A. I. Co. *v.* Canter[15] and with the doctrine of many later cases, and has never been recognized in the administration of the government. There is nothing in the words of the Constitution, nor in the history of the times, to show that the framers of the Constitution looked upon any territory of the United States, excepting the future seat of government, in any other light than as territory to be organized into states so soon as the increase of population should render that advisable.[16] The relation between the United States and the states obviously differs from the relation between the United States and the territories, in that, while the reservation to the states of the right of local self-government forbids the United States to exercise within a state any power of local government, the United States may, as respects any territory, under the express power of making rules and regulations, govern and administer that territory. In other words, Congress holds a single relation to the states, but it holds a two-fold relation to the territories. It regulates the foreign and interstate relations of the states and their relations with the territories. It also regulates the relations of the territories with foreign countries, with the states, and with each other, and in addition to that, it regulates the internal affairs of each

[14] 19 How. 393.
[15] 1 Pet. 511.
[16] McAllister *v.* U. S., 141 U. S. 174, 187.

territory. Congress is, therefore, the paramount and sole authority for every territory. As such, it may for any territory, as it has by an unbroken line of precedents from the adoption of the Ordinance of the Confederation for the government of the Northwest Territory to the Porto Rico Act in 1900, create a territorial form of government, and limit or deny the exercise of merely political rights, such as the right of suffrage;[17] establish courts, which are local courts, and not courts of the United States, and whose judges hold their offices for such terms[18] and under such conditions[19] as Congress may prescribe; impose taxation;[20] and, generally, exercise all powers of government in matters of merely local concern. But it does not follow from this that Congress may exercise, even within a territory, arbitrary or despotic power. Bradley, J., said,[21] "Doubtless Congress, in legislating for the territories, would be subject to those fundamental limitations in favour of personal rights which are formulated in the Constitution and its Amendments; but such limitations would exist rather by inference and the general spirit of the Constitution from which Congress derives all its powers, than by any express and direct application of its provisions." Similar dicta of other eminent jurists could be quoted.[22] The objection to Mr. Justice Bradley's view is that, upon every principle of construction, the power in the Constitution to make rules

[17] Murphy *v.* Ramsey, 114 U. S. 15.

[18] A. I. Co. *v.* Canter, 1 Pet. 511; Benner *v.* Porter, 9 How. 235; Clinton *v.* Englebrecht, 13 Wall. 434; Hornbuckle *v.* Toombs, 18 *id.* 648; Good *v.* Martin, 95 U. S. 90; Reynolds *v.* U. S., 98 *id.* 145; City of Panama, 101 *id.* 453.

[19] McAllister *v.* U. S., 141 U. S. 174.

[20] Loughborough *v.* Blake, 5 Wheat. 317.

[21] Mormon Church *v.* United States, 136 U. S. 44.

[22] Many are cited in the able paper of the late Richard C. Dale on "Implied Limitations upon the Exercise of the Legislative Power," 24 American Bar Association Proceedings, 295.

and regulations for the territory of the United States is a power to make only such rules and regulations as may be made in conformity with the other provisions of the Constitution. That Constitution is the only standard of statutory validity, and its powers and restrictions are to be found only in its words as judicially construed. As the Court of Appeals of New York said in a well-considered case,[23] "If the courts may imply limitation, there is no bound to implication except judicial discretion, which must place the courts above the legislature and also the Constitution itself." This principle necessarily excludes any reliance upon inference from, or reference to, the general spirit of the Constitution as a satisfactory ground of restraint upon legislative freedom of action. Indeed, it is inconceivable that men who had signed, or approved, the Declaration of Independence, who had fought in the War of the Revolution, or rejoiced in the victory then won for free government, could ever have contemplated the acquisition by the United States of any territory whose laws should be such only as Congress might arbitrarily impose. Those men who had successfully rebelled against the English crown tolerated no despotism, benevolent or otherwise. They believed in a reign of law. With Junius,[24] they thought that "laws are made to guard against what men may do, not to trust to what they will do." They, therefore, framed their written constitution, and they looked to it, and to it only, for an enumeration of the powers which the sovereign people delegated to their government. In conformity with these principles, it has been decided that constitutional restrictions are in force in the territories and in the District of Columbia so far as regards trial by jury,[25]

[23] Wynehamer *v.* The People, 13 N. Y. 428.

[24] Letter to Sir William Blackstone.

[25] Callan *v.* Wilson, 127 U. S. 540; Thompson *v.* Utah, 170 *id.* 343; C. T. Co. *v.* Hof, 174 *id.* 1. See also Mormon Church *v.* U. S., 136 *id.* 1, 67.

and so far as regards the rights secured by the V Amendment.[26]

If such be the correct view with regard to the legislative power of Congress over the internal affairs of the territories, the case would seem to be even clearer with regard to the regulation of the relations between any one territory and the states and other territories. The main reason for the adoption of the Constitution was to establish a common authority, which would in the interest of the whole country impartially regulate foreign and internal commerce, and secure to the citizens of each state and of every territory equal rights of person and of property in every other state and territory; and to that end the United States was vested with powers, and restrained in the exercise of those powers by certain expressed limitations. No one doubts that, so far as regards the states, Congress, being the creature of the Constitution, cannot exercise any power of legislation other than that which is, expressly, or by necessary implication, vested in it by the Constitution. It would also seem that even if Congress could, in the exercise of the power of making rules and regulations in its untrammelled discretion, create, and provide for the administration of, local governments in the territories, it can, nevertheless, only regulate commerce as between the states and the territories, and impose duties on exports and imports to and from the states and the territories under the powers, and subject to the restrictions, of the Constitution. Nevertheless, in the Insular Cases,[27] the Supreme Court has decided, several of the

[26] Bauman *v.* Ross, 167 U. S. 548.

[27] Downes *v.* Bidwell, 182 U. S. 244; De Lima *v.* Bidwell, *ibid.* 1; Dooley *v.* U. S., *ibid.* 222; Dooley *v.* U. S., 183 *id.* 151; Fourteen Diamond Rings, Emil J. Pepke, Claimant, *v.* U. S., *ibid.* 176. In Dorr *v.* United States, 195 U. S. 138, 154, Peckham, J., said that Downes *v.* Bidwell, *supra*, "is authority only for the proposition that the plaintiff therein was not entitled to recover the amount of duties

justices dissenting, that Congress could, after the acquisition of Porto Rico as territory of the United States,[28] impose duties upon importations into ports of the United States from Porto Rico, and into ports of Porto Rico from the United States and foreign countries, differing from the duties imposed upon importations into the United States from foreign countries. In Hawaii *v.* Mankichi [29] the court also held that a citizen of Hawaii could, after the acquisition of that island as territory of the United States, be legally convicted of crime without indictment by a grand jury and by the verdict of only a majority of a petit jury.

In Dorr *v.* U. S.,[30] the question was, whether in the absence of a statute of Congress expressly conferring the right, trial by jury is a necessary incident in judicial procedure in the Philippine Islands, where demand for trial by that method has been made by the accused and denied by the courts established in the islands. A majority of the court held that a trial by jury is not necessary to the validity of a conviction, sentence, and punishment for crime in the Philippine Islands.[31] It is possible that a

he had paid under protest upon the importation into the city of New York of certain oranges from the Port of San Juan, in the Island of Porto Rico, in November, 1900, after the passage of the act known as the Foraker Act. The various reasons advanced by the judges in reaching this conclusion, which were not concurred in by a majority of the court, are plainly not binding.'' In that view Fuller, C. J., and Brewer, J., concurred.

[28] Act of 12th April, 1900, 31 Stat. 77, c. 191.

[29] 190 U. S. 197. Fuller, C. J., and Harlan, Brewer and Peckham, JJ., dissented.

[30] 195 U. S. 138.

[31] Day, J., delivered the judgment of the court, and Fuller, C. J., and Brewer and Peckham, JJ., concurred in the result upon the authority of Hawaii *v.* Mankichi, 190 U. S. 197. Harlan, J., dissented, saying, p. 154: ''In my opinion, guaranties for the protection of life, liberty, and property, as embodied in the Constitution, are for the benefit of all, of whatever race or nativity, in the states composing the Union, or in any territory, however acquired, over the inhabitants of which the government of the United States may exercise the powers conferred upon it by the Constitution.''

mistake was made in these cases in not distinguishing between the congressional powers of general, and of local, government as affecting the territories, and in not holding that the Act of 12th April, 1900, was, in so far as it imposed duties, an act of general, and not of local, legislation, and, as such, subject to constitutional restrictions, and in not holding that the Constitution equally protects every inhabitant of any state or territory in his rights of person and of property. Mr. Justice White[32] concedes that a duty levied in the United States on goods coming from Porto Rico is not a local tax and, therefore, not an exercise of the power of local government, but he supports the validity of such a tax upon the theory that Porto Rico had not been "incorporated" into the United States. Mr. Chief Justice Fuller[33] seems to answer this view by calling attention to the provisions of the act imposing the duty, and at the same time creating a civil government for Porto Rico, constituting its inhabitants a body politic, giving it a governor and other officers, a legislative assembly, and courts with the right of appeal therefrom to the Supreme Court of the United States, and thereby making that island, whatever its situation before, then and thenceforth an organized territory of the United States; and Mr. Justice Harlan[34] pertinently suggests, that "if Porto Rico, although a territory of the United States, may be treated as if it were not a part of the United States, then New Mexico and Arizona may be treated as not parts of the United States, and subject to such legislation as Congress may choose to enact without any reference to the restrictions imposed by the Constitution." The same learned justice also said[35] that the doctrine of

[32] 182 U. S. 299.
[33] *Ibid.* 372.
[34] *Ibid.* 389.
[35] Hawaii *v.* Mankichi, 190 U. S. 197, 240.

the Insular Cases means, "that, if the principles now announced should become firmly established, the time may not be far distant when, under the exactions of trade and commerce, and to gratify an ambition to become the dominant political power in all the earth, the United States will acquire territories in every direction, which are inhabited by human beings, over which territories, to be called 'dependencies' or 'outlying possessions,' we will exercise absolute dominion and whose inhabitants will be regarded as 'subjects' or 'dependent peoples,' to be controlled as Congress may see fit, not as the Constitution requires, nor as the people governed may wish."

It may well be doubted whether the advantages, commercial and otherwise, obtainable by the acquisition and retention of foreign colonial possessions will ever compensate the country for their cost in lives and in money, and for the difficulties to be encountered in the extension of free institutions and constitutional government to peoples, whose history and traditions are foreign to any such system. But as we have acquired colonial possessions, and have, by reason of such acquisition, assumed obligations to them, and to foreign nations, all that can now be done is to govern those peoples kindly, justly, and firmly, and to educate them s rapidly as possible for the duties of citizenship.

CHAPTER II.

THE IMPLIED POWERS.

9. The necessity of their existence.
10. Their constitutional recognition.
11. The test of the relation of the means to the end.
12. Illustrations of the exercise of the implied powers.
13. The legal tender question.

The necessity of their existence.

9. The Constitution was not framed to meet only the exigencies of the period of its formation, nor does it purport to be a code which with minute detail prescribes all that may be done and all that may not be done by Congress in the execution of the powers specifically granted.[1] As Mr. Webster said in his argument in Gibbons *v.* Ogden,[2] and as Marshall, C. J., repeated in his judgment in that cause,[3] the Constitution enumerates, but does not define, the powers which it grants, nor does it prescribe the means which may rightfully be used in executing those powers, and without whose use the grant of the powers would be nugatory.[4] Therefore, if the Constitution contained no clause recognizing the existence of powers which are subsidiary or incidental to the powers expressly granted, it would be impossible to avoid the conclusion that there is an implied grant of such incidental powers, for otherwise the powers expressly granted would be practically inoperative. Nor is the force of this conclusion at all affected by the X Amendment, for while

[1] McCulloch *v.* Maryland, 4 Wheat. 406; Martin *v.* Hunter's Lessee, 1 *id.* 326.

[2] 6 Webster's Works, 9.

[3] 9 Wheat. 189.

[4] McCulloch *v.* Maryland, 4 Wheat. 407.

that amendment in terms forbids the exercise by Congress of any undelegated power, it does not forbid the exercise of powers which are delegated by implication.[5]

Their constitutional recognition.

10. Section 8 of Article I of the Constitution declares that "the Congress shall have power . . . to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof." But, it may be said, who is to conclusively determine whether or not any statute is, within the terms of the Constitution, "necessary and proper for carrying into execution" a power granted by the Constitution to Congress? If Congress can so determine, obviously any and every act of Congress must be regarded as constitutional. If in the exercise of judicial jurisdiction the final determination of that question is to be made by the court, what principles are to guide the judges in coming to a conclusion, and by what test are they to determine the relation between the means and the end, and the degree of the necessity and the propriety of the use of the particular means?

The test of the relation of the means to the end.

11. The result of the authorities, so far as they afford an answer to this question, can be best stated by the quotation of a famous dictum originated by Mr. Hamilton[6] and paraphrased by Chief Justice Marshall in the judgment in McCulloch *v.* Maryland,[7] and which, in its

[5] Mr. Hamilton's argument as to a national bank. 3 Lodge's Hamilton's Works, 183; McCulloch *v.* Maryland, 4 Wheat. 406.

[6] Argument as to a national bank. 3 Lodge's Hamilton's Works, 190.

[7] 4 Wheat. 421.

final perfected form, is as follows: "Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to the end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional."[8] This dictum means that Congress may, in the execution of a power expressly granted, adopt any means which (1) are not expressly prohibited by the Constitution, nor (2) inconsistent with the letter and spirit of the Constitution, and which are (3) not the only possible means, nor an absolutely or indispensably necessary means, but an appropriate and plainly adapted means, to the attainment of an end authorized by the Constitution. From this it follows, that if the relation of the means to the end be shown to exist, and if the use of the particular means be not expressly or impliedly forbidden by the Constitution, the question of the degree of its appropriateness, of its greater or less adaptation, and of its relative or absolute necessity is purely political, and the determination of Congress with regard thereto is binding upon the courts.

Illustrations of the exercise of the implied powers.

12. Under the doctrine of the implied powers, it has been held that Congress may enact statutes creating banking corporations as fiscal aids to the government;[9] imposing upon national and state banks a tax upon the amount of the notes of state banks paid out by them;[10] giving priority to the United States as a creditor in the

[8] The opposing view, sustaining the strict construction of the Constitution, is, perhaps, most strongly put by Mr. Jefferson. Memoirs, Vol. IV, pp. 197, 207, 526; 4 Elliot's Debates, 609.

[9] McCulloch *v.* Maryland, 4 Wheat. 316; Osborn *v.* The Bank of the U. S., 9 *id.* 738.

[10] Veazie Bank *v.* Fenno, 8 Wall. 533.

distribution of the assets of a bankrupt;[11] declaring that the embezzlement by a guardian of his ward's pension granted by the United States is a crime against the United States;[12] taxing lands in the District of Columbia;[13] declaring it to be a crime to bring into the United States from a foreign place counterfeit coins forged in the similitude of coins of the United States;[14] constituting a judicial system to carry into execution the judicial powers vested by the Constitution in the United States;[15] regulating the carriage of the mails and determining what may be transported and what must be excluded from the mails;[16] punishing for contempt others than members of Congress;[17] protecting citizens of the United States in the exercise of the rights of suffrage at elections for members of Congress;[18] authorizing a limited intercourse on prescribed conditions with the enemy in time of war;[19] prescribing the effect to be given in state courts to judgments and decrees rendered in courts of the United States;[20] authorizing the issue by courts of the United States of writs of *habeas corpus ad subjiciendum* in cases of restraint of personal liberty under the process of state courts issued in violation of rights claimed under the Constitution or laws of the United States;[21] authorizing the removal to the courts of the United States of

[11] U. S. *v.* Fisher, 2 Cr. 358.

[12] U. S. *v.* Hall, 98 U. S. 343.

[13] Loughborough *v.* Blake, 5 Wheat. 317.

[14] U. S. *v.* Marigold, 9 How. 560.

[15] Ableman *v.* Booth, 21 How. 506, 521.

[16] *Ex parte* Jackson, 96 U. S. 727; *In re* Rapier, 143 *id.* 110.

[17] Anderson *v.* Dunn, 6 Wheat. 204; *In re* Chapman, 166 U. S. 661. But see Kilbourn *v.* Thompson, 103 *id.* 168.

[18] *Ex parte* Yarbrough, 110 U. S. 651.

[19] Hamilton *v.* Dillin, 21 Wall. 73.

[20] Embry *v.* Palmer, 107 U. S. 3.

[21] *Ex parte* Royall, 117 U. S. 241; *Ex parte* Fonda, *ibid.* 516; *In re* Neagle, 135 *id.* 1; Ohio *v.* Thomas, 173 *id.* 276; Boske *v.* Comingore, 177 *id.* 459; *cf.* Minnesota *v.* Brundage, 180 *id.* 499.

causes depending in state courts and involving questions of federal cognizance;[22] exercising the right of eminent domain with regard to land within the bounds of a state and held in private ownership;[23] in order to protect purchasers under the homestead laws of lands belonging to the United States but situated within the limits of a state, punishing those who conspire to intimidate such purchasers and drive them away from the land so purchased;[24] prohibiting, under penalties, officers of the United States from requesting, giving to, or receiving from any other officer money or property, or other things of value, for political purposes;[25] protecting against unlawful violence prisoners accused of committing crimes against the United States,[26] and private citizens giving information against prisoners so held;[27] providing for the acquisition of territory;[28] establishing consular tribunals in foreign lands;[29] and providing for the exclusion[30] or expulsion[31] of aliens from the limits of the United States.

[22] Martin *v.* Hunter's Lessee, 1 Wheat. 304, 349; Bock *v.* Perkins, 139 U. S. 628; Marshall *v.* Holmes, 141 *id.* 589; Martin *v.* B. & O. R., 151 *id.* 673.

[23] Kohl *v.* U. S., 91 U. S. 367; Luxton *v.* N. R. Bridge Co., 153 *id.* 525; Chappell *v.* U. S., 160 *id.* 499; U. S. *v.* G. E. Ry., *ibid.* 668.

[24] U. S. *v.* Waddell, 112 U. S. 76.

[25] *Ex parte* Curtis, 106 U. S. 371; Stat. 15th Aug., 1876, c. 287, sec. 6.

For further illustrations of the implied powers of legislation which Congress may exercise, see the judgments of Story, J., in Prigg *v.* Penna., 16 Pet. 619; of Strong, J., in The Legal Tender Cases, 12 Wall. 457, 535; of Gray, J., in Juilliard *v.* Greenman, 110 U. S. 421, 444; of Miller, J., in *Ex parte* Yarbrough, *ibid.* 658, and in *In re* Neagle, 135 *id.* 1, and of Bradley, J., in Mormon Church *v.* U. S., 136 *id.* 1. In Downes *v.* Bidwell, 182 *id.* 244, and again in Dooley *v.* U. S., 183 *id.* 151, the court sustained an act of Congress which imposed duties for the exclusive benefit of those who were not citizens of the United States.

[26] Logan *v.* U. S., 144 U. S. 263.

[27] *In re* Quarles and Butler, 158 U. S. 532.

[28] A. I. Co. *v.* Canter, 1 Pet. 511; De Lima *v.* Bidwell, 182 U. S. 1.

[29] *In re* Ross, 140 U. S. 453.

[30] Chinese Exclusion Case, 130 U. S. 581; Lem Moon Sing *v.* U. S., 158 *id.* 538.

[31] Fong Yue Ting *v.* U. S., 149 U. S. 698; Japanese Immigrant Case, 189 *id.* 86.

The legal tender question.

13. It has also been held that Congress may issue a paper currency and declare that that currency shall be a legal tender in payment of debts. Until in 1862 the financial needs of the government in carrying on a war for the suppression of the rebellion rendered it, in the opinion of Congress, necessary that the treasury notes of the United States should be made a legal tender in the payment of debts, neither statesmen nor jurists had asserted that Congress had, under the Constitution, the power of making anything but gold or silver coin a legal tender. The acts of Congress of 25th February, 1862, 11th July, 1862, and 3d March, 1863,[32] declared that the notes issued thereunder should be "lawful money and a legal tender in payment of all debts, public and private, within the United States, except duties on imports, etc." Under these acts it has been decided that neither taxes imposed by state authority,[33] nor private obligations payable by their terms in gold or silver coin,[34] are debts within the terms of the acts of Congress dischargeable by payment in legal tender notes. In Hepburn *v.* Griswold,[35] the court held that the Legal Tender Acts applied to debts contracted before as well as to debts contracted after the enactment of those statutes, and that, so far as they applied to debts contracted before their passage, the statutes were unconstitutional, but in the Legal Tender Cases[36] Hepburn *v.* Griswold was overruled, so far as regards the second branch of the proposition laid down in it, and the constitutionality of the Legal Tender Acts

[32] 12 Stat. 345, 532, 709.

[33] Lane County *v.* Oregon, 7 Wall. 71; Hagar *v.* Reclamation District, 111 U. S. 701.

[34] Bronson *v.* Rodes, 7 Wall. 229; Butler *v.* Horwitz, *ibid.* 258; Bronson *v.* Kimpton, 8 *id.* 444.

[35] 8 Wall. 603.

[36] 12 Wall. 457.

was sustained, the ground of decision being that the power to impress the notes of the government with the quality of legal tender, though not expressed in the Constitution, was "necessary and proper for carrying into execution" the express powers to "coin money," "to regulate the value thereof," "to pay the debts," "to borrow money," "to raise and support armies," and "to provide and maintain a navy;" that the Constitution does not expressly prohibit the issue of legal tender notes by the United States; that their issue is not inconsistent with the letter or the spirit of the Constitution, and that the end being constitutional and the means being appropriate, the degree of its appropriateness is subject to legislative, and not judicial, determination. The Legal Tender Cases are followed and supported by Dooley *v.* Smith,[37] Bigler *v.* Waller,[38] N. & W. R. *v.* Johnson[39] and Julliard *v.* Greenman,[40] in the last of which cases it was held, that the power to make treasury notes a legal tender exists in time of peace as well as in time of war, and that legal tender notes when redeemed by the Treasury and reissued under the Act of 31st May, 1878, retain their legal tender quality.

The legal tender which the law compels a creditor to accept in satisfaction of a debt payable in money should never be anything other than that money which has a market value as a commodity, independently of any governmental fiat and of all legal tender laws. The giving of the legal tender quality to currency of inferior purchasing power has never succeeded in increasing that purchasing power, but it has in many instances enabled debtors to defraud creditors.

[37] 13 Wall. 604.
[38] 14 Wall. 297.
[39] 15 Wall. 195.
[40] 110 U. S. 421.

CHAPTER III.

TAXATION.

14. Taxation defined and limited.
15. Taxation by the United States.
16. Restrictions upon federal taxation.
17. Taxation of exports.
18. Direct taxation.
19. Requirement of uniformity.
20. Taxation in the territories.
21. Exemption of state agencies from taxation by the United States.
22. Charges which are not taxes exempt from constitutional restraints.
23. Taxation by the states.
24. Expressed restraints upon state taxation.
25. Implied restraint upon state taxation resulting from the federal supremacy.
26. Taxation of national banks.
27. State taxation as affected by the prohibition of the impairment of the obligation of contracts.
28. State taxation as affected by the grant to Congress of the power of regulating commerce.

Taxation defined and limited.

14. Taxation is the compulsory exaction by a government, in the exercise of its sovereignty, of a payment of money or surrender of property by any person, natural or corporate, who, or whose property so taxed, is subject to the sovereign power of that government.[1] Taxation operates upon real property and upon tangible personal property by reason of its *situs* or presence within the territory of the taxing power.[2] It operates upon choses in action by reason of the subjection of the owner thereof

[1] The State Freight Tax, 15 Wall. 277; McCulloch *v.* Maryland, 4 Wheat. 420; Ashley *v.* Ryan, 153 U. S. 436; N. Y., L. E. & W. R. *v.* Pennsylvania, *ibid.* 628; D. & H. C. Co. *v.* Pennsylvania, 156 *id.* 200; W. U. T. Co. *v.* Taggart, 163 *id.* 1; Savings Society *v.* Multnomah County, 169 *id.* 421; Dewey *v.* Des Moines, 173 *id.* 193.

[2] Mager *v.* Grima, 8 How. 490; Coe *v.* Errol, 116 U. S. 517; P. P. C. Co. *v.* Pennsylvania, 141 *id.* 18; C., C., C. & St. L. Ry. *v.* Backus, 154 *id.* 439; Savings Society *v.* Multnomah County, 169 *id.* 421; Bristol *v.* Washington County, 177 *id.* 133.

to the jurisdiction of the government imposing the tax.[3] Every possible exaction of money or property by a government from those who are subject to its jurisdiction is not a tax; thus, a duty of so much per passenger, imposed by the United States in the exercise of the power to regulate commerce on owners of vessels bringing passengers from foreign ports into ports of the United States, in order to raise a fund to mitigate the evils incident to immigration, is "not a tax or duty within the meaning of the Constitution;"[4] for, as Miller, J., said in the judgment in that cause,[5] "the money thus raised, though paid into the treasury, is appropriated in advance to the uses of the statute, and does not go to the general support of the government. It constitutes a fund raised from those who are engaged in the transportation of those passengers, and who make profit out of it, for the temporary care of the passengers whom they bring among us and for the protection of the citizens among whom they are landed." Nor is a tax levied, in the strict sense of the word, when the cost of executing the banking laws is met by a charge on bank notes, and a bill for that purpose need not originate in the House of Representatives.[6] On the same principle, a charge made by a state for facilities furnished by it, directly or indirectly, for the movement of commerce, in the form of improved waterways,[7] or wharves,[8] or railways,[9] or a charge on telegraph com-

[3] Bonaparte *v.* Tax Court, 104 U. S. 592; Nevada Bank *v.* Sedgwick, *ibid.* 111; Kirtland *v.* Hotchkiss, 100 *id.* 491; N. Y., L. E. & W. R. *v.* Pennsylvania, 153 *id.* 628; D. & H. C. Co. *v.* Pennsylvania, 156 *id.* 200.

[4] The Head Money Cases, 112 U. S. 580.

[5] P. 595.

[6] Twin City Bank *v.* Nebeker, 167 U. S. 196.

[7] Huse *v.* Glover, 119 U. S. 543; Sands *v.* M. R. I. Co., 123 *id.* 288; L. & P. Co. *v.* Mullen, 176 *id.* 126. But see Harman *v.* Chicago, 147 *id.* 396.

[8] Packet Co. *v.* Keokuk, 95 U. S. 80; Packet Co. *v.* St. Louis, 100 *id.* 423; Vicksburg *v.* Tobin, *ibid.* 430; Packet Co. *v.* Catlettsburg, 105 *id.* 559; Transportation Co. *v.* Parkersburg, 107 *id.* 691; O. P. Co. *v.* Aiken, 121 *id.* 444.

[9] B. & O. R. *v.* Maryland, 21 Wall. 456.

panies for the use of the streets for their poles, or for the governmental supervision of their poles and wires,[10] or a charge on adjoining property for local improvements, [11] or a charge for quarantine or other examination,[12] cannot be said to be a tax. The power of taxation is vested in the legislative department of the government,[13] but it may be delegated by states to political subdivisions, such as counties and municipalities,[14] and a state may determine the bounds of a municipality and prescribe its rate of taxation.[15] By whomsoever exercised, or to whomsoever delegated, the power can only be exercised for public purposes. Taxes, therefore, cannot be imposed in aid of enterprises strictly private, such as the establishment of manufactories[16] or of private grist mills;[17] but when the purpose is public, though not directly connected with the administration of government, taxes may rightfully be laid to aid in its accomplishment, as in the cases of state reform schools;[18] grist mills required by statute to grind for all customers on payment of certain tolls;[19]

[10] St. Louis *v.* W. U. T. Co., 148 U. S. 92; P. T. C. Co. *v.* Baltimore, 156 *id.* 210; W. U. T. Co. *v.* New Hope, 187 *id.* 419. Charges for supervision in P. T. C. Co. *v.* New Hope, 192 *id.* 55; P. T. C. Co. *v.* Taylor, *ibid.* 64, were excessive and therefore invalid. See also A. & P. T. Co. *v.* Philadelphia, 190 *id.* 160.

[11] I. C. R. *v.* Decatur, 147 U. S. 190; Peake *v.* New Orleans, 139 *id.* 342; Fallbrook Irr. Dist. *v.* Bradley, 164 *id.* 112; Ford *v.* D. & P. L. Co., *ibid.* 662; *cf.* Spencer *v.* Merchant, 125 *id.* 345. See also Norwood *v.* Baker, 172 *id.* 269; Dewey *v.* Des Moines, 173 *id.* 193; French *v.* B. A. P. Co., 181 *id.* 324; Tonawanda *v.* Lyon, *ibid.* 389; Carson *v.* Brockton S. Com., 182 *id.* 398; King *v.* Portland, 184 *id.* 61; Voigt *v.* Detroit, *ibid.* 115; Goodrich *v.* Detroit, *ibid.* 432.

[12] Morgan *v.* Louisiana, 118 U. S. 455; N., C. & St. L. Ry. *v.* Alabama, 128 *id.* 96. See also C., C. & A. R. *v.* Gibbes, 142 *id.* 386.

[13] Meriwether *v.* Garrett, 102 U. S. 472.

[14] Gilman *v.* Sheboygan, 2 Bl. 510; U. S. *v.* New Orleans, 98 U. S. 381.

[15] Kelly *v.* Pittsburgh, 104 U. S. 78.

[16] Loan Assn. *v.* Topeka, 20 Wall. 655; Parkersburg *v.* Brown, 106 U. S. 487; Cole *v.* La Grange, 113 *id.* 1.

[17] Osborne *v.* County of Adams, 106 U. S. 181, 109 *id.* 1.

[18] County of Livingston *v.* Darlington, 101 U. S. 407.

[19] Burlington *v.* Beasley, 94 U. S. 310.

the improvements of water powers of rivers for general purposes;[20] the payment of bounties to volunteer soldiers in time of war;[21] or for the construction of railways.[22] When bonds, though issued in aid of private purposes, on their face appear to have been issued for public purposes, they are valid and enforceable in the hands of bona fide holders for value and without notice.[23]

Taxation by the United States.

15. Section 8 of Article I of the Constitution declares that "the Congress shall have power to lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts, and excises shall be uniform throughout the United States." At one period in the history of the country political parties were at issue as to the construction to be given to this section of the Constitution, the Federalists contending that the section granted in express terms three substantive and independent powers, namely, (1) to lay and collect taxes, duties, imposts, and excises, (2) to pay the debts, and (3) to provide for the common defense and general welfare of the United States; and the Democrats asserting that the section granted but one substantive power, that to lay and collect taxes, duties, imposts, and excises, and limited the exercise of that power to the purpose of paying the debts and providing for the common defense and general welfare of the United States. The Federalist view was open to the objection that a power

[20] Blair *v.* Cuming County, 111 U. S. 363.

[21] Middleton *v.* Mullica Township, 112 U. S. 433.

[22] Rogers *v.* Burlington, 3 Wall. 654; Queensbury *v.* Culver, 19 *id.* 83; Taylor *v.* Ypsilanti, 105 U. S. 60; Olcott *v.* The Supervisors, 16 Wall. 678; R. Co. *v.* County of Otoe, *ibid.* 667; Young *v.* Clarendon Township, 132 U. S. 340. See also Wilkes County Comrs. *v.* Coler, 190 *id.* 107.

[23] Hackett *v.* Ottawa, 99 U. S. 86; Ottawa *v.* National Bank, 105 *id.* 343; Ottawa *v.* Carey, 108 *id.* 110, 118.

to legislate for the common defense and general welfare of the United States would authorize Congress to do anything and everything, and would render superfluous the delegation of other express powers of legislation in the same section; but the Democratic view, however sound in theory, could never be judicially affirmed, for, as Congress has admittedly some power of taxation, a court, looking, as it is bound to look, not at the question of expediency but solely at the question of power, could never determine an act of Congress imposing a tax to be unconstitutional because it was intended for some purpose other than that of paying the debts and providing for the common defense and general welfare of the United States. That restraint, therefore, upon the congressional power of taxation, if it be a restraint, is of moral, and not of legal, sanction.

Restrictions upon federal taxation.

16. "The power of Congress to tax . . . is given in the Constitution with only one exception and only two qualifications. Congress cannot tax exports, and it must impose direct taxes by the rule of apportionment, and indirect taxes by the rule of uniformity. Thus limited, and thus only, it reaches every subject and may be exercised at discretion." [24] The constitutional power of taxation vested in the United States is coextensive with the territory "subject to their jurisdiction." It does not operate in a port of one of the United States during a temporary occupation of that port by the armed forces of a public enemy,[25] nor in foreign territory temporarily occupied by the armed forces of the United States,[26] but during such temporary occupation the armed forces in possession

[24] License Tax Case, 5 Wall. 471. See McCray *v.* U. S., 195 U. S. 27.
[25] U. S. *v.* Rice, 4 Wheat. 246.
[26] Fleming *v.* Page, 9 How. 603.

of such territory may, under the rules of international law, levy and collect such duties and taxes as the military authorities impose.[27] On the other hand, the constitutional power of taxation does operate upon foreign territory acquired by treaty, but only from and after the ratification of the treaty. Thus, importations into California after the ratification of the treaty which ended the war with Mexico and ceded California to the United States were subject to duties under the then tariff laws of the United States, which took effect immediately upon the ratification of the treaty.[28] Conversely, from and after the ratification of the treaty which ended the war with Spain and ceded Porto Rico and the Philippines to the United States, those islands ceased to be foreign territory, and thereafter, but only until Congress otherwise provided,[29] importations from those islands into other ports of the United States were not subject to duty under the then tariff laws of the United States,[30] and, so far as regards the Philippines, that conclusion was not affected by the continuance in insurrection against the United States of those who had previously been in insurrection against Spain. The constitutional power of taxation is, therefore, operative within the states, in the District of Columbia,[31] and also in the territories, but only to the extent of the constitutional grant and subject to the limitations imposed by the Constitution, with the important exceptions that in Porto Rico and the Philippines its operation is not subject to the constitutional requirement of uniformity,[32] and that articles exported from the states

[27] Dooley *v.* U. S., 182 U. S. 222.

[28] Cross *v.* Harrison, 16 How. 164.

[29] Downes *v.* Bidwell, 182 U. S. 244.

[30] De Lima *v.* Bidwell, 182 U. S. 1; Fourteen Diamond Rings, Pepke, Claimant, *v.* U. S., 183 *id.* 176.

[31] Loughborough *v.* Blake, 5 Wheat. 317.

[32] Downes *v.* Bidwell, 182 U. S. 244.

to Porto Rico may be taxed by duties levied upon those articles when "imported from the United States" into Porto Rico.[33]

Taxation of exports.

17. "No tax or duty shall be laid on articles exported from any state."[34] The constitutional language is "no tax or duty," and "the requirement is that exports shall be free from any governmental burden."[35] The word "export," as used in the constitutional prohibition of state imposition of duties,[36] has been held to apply only to foreign, and not to interstate, commerce,[37] and the same construction has been given by a divided court[38] to the prohibition of the imposition by the United States of duties on exports, as affecting goods, to quote the words of the statute, "imported from the United States" into Porto Rico under the Act of 12th April, 1900.[39] Yet the place at which the duty is levied and collected ought not to be held to change the character of the duty. As Marshall, C. J., suggested,[40] a duty upon exports would not cease to be such when collected by a revenue cutter cruising off the coast. If so, why does the duty cease to be a duty upon exports when collected for the United States by officers of the United States under an act of Congress at an island in the West Indies ceded to, owned by, and governed by the United States, and when the act in terms imposes the duties upon goods "imported from the United States?" It is obviously the fact that "no article can be imported from one state into another which is not at the

[33] Dooley *v.* U. S. (second case), 183 U. S. 151.
[34] Article I, Sec. 9, Par. 5.
[35] Per Brewer, J., Fairbank *v.* U. S., 181 U. S. 283.
[36] Article I, Sec. 10, Par. 2.
[37] Woodruff *v.* Parham, 8 Wall. 123.
[38] Dooley *v.* U. S. (second case), 183 U. S. 151. Four justices dissented.
[39] 31 Stat. 77, c. 191, secs. 2 and 3.
[40] Brown *v.* Maryland, 12 Wheat. 445.

same time exported from the former."[41] It would seem to be equally clear that goods "imported from the United States" into Porto Rico are as certainly goods exported from the United States to Porto Rico. It may also be suggested that the constitutional prohibition applies in terms to articles exported from any state without regard to their destination, and that there is nothing in the terms of the provision, or in its context, or in the history of the Constitution, to support a judicial qualification of the provision by adding thereto the words "to foreign countries." In the view of the court, Porto Rico is at one and the same time "foreign" in order to justify the collection at ports of the United States of duties upon imports from Porto Rico, and "domestic" in order to justify the collection at Porto Rico of duties upon exports from the United States.

Internal revenue stamps required to be placed by the manufacturer upon articles made for exportation were held not to fall within the prohibition, when "intended for no other purpose than to separate and identify" that "which the manufacturer desires to export, and thereby instead of taxing it to relieve it from the taxation" to which articles intended for domestic use are subjected;[42] and the Constitution does not prohibit the imposition of the same amount of internal revenue taxation upon goods exported as upon similar goods intended for domestic consumption;[43] but, on the other hand, a specific stamp duty imposed "for and in respect of the . . . paper . . . upon which . . . shall be written or printed . . . a bill of lading," and not graduated in amount according to the quantity or value of the articles covered thereby, has been held, in a recent

[41] Per Miller, J., in Woodruff *v.* Parham, 8 Wall. 123.
[42] Pace *v.* Burgess, 92 U. S. 372; Turpin *v.* Burgess, 117 *id.* 504.
[43] Cornell *v.* Coyne, 192 U. S. 418.

case,[44] by a divided court, four justices dissenting, to be in effect a tax upon the articles covered by the bill of lading, and, therefore, as applied to foreign and outgoing bills of lading, a tax upon exports.

Direct taxation.

18. "No capitation or other direct tax shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken."[45] "Ordinarily all taxes paid primarily by persons who can shift the burden upon some one else, or who are under no legal compulsion to pay them, are considered indirect taxes,"[46] and taxes imposed upon individuals in their personal capacity, or upon individuals in respect of their ownership of their property, are direct taxes.[47] In 1796 the court decided[48] that a tax on carriages for the conveyance of persons under the act of 1794[49] was an excise, and, therefore, an indirect tax. In the argument Alexander Hamilton said, "The following are presumed to be the only direct taxes: capitation or poll taxes; taxes on lands and buildings; general assessments, whether on the whole property of individuals or on their whole real or personal property. All else must of necessity be considered as indirect taxes." Chase, J., said that he was inclined to think, but did not give a judicial opinion, "that the direct taxes contemplated by the Constitution are only two, to wit, a capitation, or poll tax, simply without regard to property, possession, or any other circumstances; and a tax on land."[50] Paterson, J., said,

[44] Fairbank *v.* U. S., 181 U. S. 283.
[45] Constitution, Art. I, Sec. 9, Par. 4.
[46] Per Fuller, C. J., Pollock *v.* F. L. & T. Co., 157 U. S. 558.
[47] Hon. Geo. F. Edmunds' Argument, *ibid.* 491.
[48] Hylton *v.* U. S., 3 Dall. 171.
[49] 1 Stat. 373.
[50] 3 Dall. 175.

"Whether direct taxes, in the sense of the Constitution, comprehend any other tax than a capitation tax, and tax on land, is a questionable point."[51] Iredell, J., said, "Perhaps a direct tax . . . can mean nothing but a tax on something inseparably annexed to the soil; something capable of apportionment under all such circumstances."[52] Wilson, J., contented himself with affirming the constitutionality of the tax in question.[53] It was held in later cases that neither taxes on personal incomes[54] under the Act of 5th August, 1861,[55] and its supplements; nor taxes on distilled spirits;[56] nor taxes on manufactured tobacco;[57] nor taxes on the business of refining sugar, measured by the gross annual receipts of the refiners;[58] nor succession duties on the devolution of title to real or personal estate;[59] nor stamp duties on a memorandum of sale of a certificate of stock,[60] or on an "agreement of sale or agreement to sell any products or merchandise at any exchange, or board of trade, or other similar place, either for present or future delivery;"[61] nor taxes on the notes of state banks paid out by national banks;[62] nor taxes on the receipts of insurance companies from premiums and assessments,[63] are direct taxes, but that all such taxes are imposts or

[51] *Ibid.* 177.
[52] *Ibid.* 183.
[53] *Ibid.* 184.
[54] Springer *v.* U. S., 102 U. S. 586.
[55] 12 Stat. 309.
[56] U. S. *v.* Singer, 15 Wall. 111.
[57] Patton *v.* Brady, 184 U. S. 609.
[58] S. S. R. Co. *v.* McClain, 192 U. S. 397.
[59] Scholey *v.* Rew, 23 Wall. 331; Knowlton *v.* Moore, 178 U. S. 41, 79, 83; Murdock *v.* Ward, *ibid.* 139.
[60] Thomas *v.* U. S., 192 U. S. 363.
[61] Nicol *v.* Ames, 173 U. S. 509. The Union Stock Yards in Chicago are a "similar place" within the meaning of the taxing act.
[62] V. Bank *v.* Fenno, 8 Wall. 533; National Bank *v.* U. S., 101 U. S. 1.
[63] P. I. Co. *v.* Soule, 7 Wall. 433.

excises. It has been suggested that the tax under consideration in the Hylton case was in reality a tax upon transportation and as such capable of transference to the person carried, and, therefore, when imposed upon the carrier clearly an indirect, and not a direct, tax; that the tax under consideration in Singer's case was clearly an excise; that the tax under consideration in the Veazie Bank case was in its own nature not a tax at all, but an exercise by Congress of the power to prohibit the issue of circulation by state banks in order to stimulate the formation of national banks; and that the tax under consideration in the Insurance Company's case was an indirect tax because capable of transference to the policy-holders paying premiums and assessments. Springer's case was decided long after the income tax of 1861 had been repealed, and when the popular and professional interest in the subject had ended, for no one then believed that this country would ever again be called upon to pay an income tax under the laws of the United States. It is the consensus of economic authorities that income tax laws, even when wisely framed, should be reserved only for great public emergencies, for the reason that they are necessarily unequal in operation in that they fall most heavily on those who conscientiously make full returns; and that when resorted to they should tax impartially the surplus income of every citizen, over and above that minimum which suffices for the necessities of the life of an individual, and that incomes received from salaries, or from professional compensation, if taxed at all, should, by reason of their terminable character, be less heavily taxed than incomes derived from invested funds. Under the income tax legislation of 1861 and its supplements, when the amount exempted was $600 the tax was paid by only four hundred

and sixty thousand persons, and when the amount exempted was $1,000 the tax was paid by less than two hundred and fifty thousand persons. The state of New York paid nearly one-third of that tax, and the states of New York and Pennsylvania paid nearly one-half thereof. The population and the wealth of the country had largely increased in the years preceding 1894, but it is certain that by reason of the larger amount exempted from taxation under the act of that year, the burden of the tax imposed by that law would have been borne by a relatively small number of persons, certainly not more than two per cent. of the population of the country. That law was a very objectionable specimen of class legislation. Not content with exempting the minimum amount which suffices for the necessities of the life of an individual, and which in 1894 certainly did not exceed $600, it enlarged the exemption to $4,000. It made no distinction between income received from salaries, or as professional compensation, and income derived from invested securities. While purporting to exempt from all taxation the incomes of charities, it yet taxed so much of their incomes as were derived from investments in corporate shares. It taxed as income the receipt by a widow or an orphan of that amount of insurance upon the life of the husband or father, which might possibly constitute the whole principal fund for the support of the beneficiaries. It taxed the interest received from investments in state, county, and municipal securities. It made no distinction between the rental received from productive land and moneys received from the sale of minerals, the taking away of which diminishes the principal. In taxing the rental of land, it necessarily taxed the land itself. It taxed profits realized on sales of real estate within two years, and it forbade a deduction for losses on like sales. It allowed a deduction

of $4,000 from the income of an unmarried person and it permitted only one exemption to that amount from the aggregate incomes of a family composed of parents, minor children, or husband and wife. It taxed without exemption income derived from corporate securities and it permitted the exemption in the case of incomes otherwise derived. It vested oppressive, arbitrary, and uncontrollable power in the tax collectors. It was an example of all that a tax law ought not to be. The constitutionality of that act came before the Supreme Court of the United States in 1895.[64] It was argued that the judgment in Springer *v.* United States [65] did not establish any rule of property, and was, therefore, open to reconsideration; that that judgment was based solely on the dicta in Hylton *v.* United States; [66] and that, even if those dicta were binding authorities, capitation taxes were in reality nothing else than taxes imposed upon persons, either per capita, or graded in amount according to the possessions or income of the person; that taxes on the income of real estate were in substance taxes on the real estate from which the income was derived; and that taxes on the income from securities issued by a state, or by any political sub-division thereof, were taxes upon agencies of state government. It was argued in reply that the dicta in Hylton's case had not only been recognized by jurists and commentators as fixing the construction of the Constitution, but had also received the approval of the court in Springer's case; that the term "capitation" taxes as understood by the framers of the Constitution, meant nothing more than poll taxes; and that the income of any person, from whatever source derived, was a legal entity, entirely distinct from its sources, and, therefore, independently taxable; and that

[64] Pollock *v.* F. L. & T. Co., 157 U. S. 429, and, on rehearing, 158 *id.* 601.
[65] 102 U. S. 586.
[66] 3 Dall. 175.

with the policy of the legislation the court had nothing to do, and could only concern itself with the grounds of legal objection. At the first hearing it was decided, two justices dissenting, that so much of the act as provided for levying taxes upon incomes derived from real estate was invalid, because such taxes are in legal effect taxes upon real estate, and are, as such, direct taxes, and can only be imposed according to the rule of apportionment, and that so much of that act as taxed income derived from investments in state, county, and municipal securities was invalid because taxes on the states and on their instrumentalities of government. The justices who heard the argument were, however, equally divided, and, therefore, expressed no opinion, as to the other questions raised. Upon the rehearing, the court decided, four justices dissenting, that, in addition to the points decided at the first hearing, a tax on an individual in respect of his income derived from real, or personal, property is a direct tax, and, therefore, can be laid only under the rule of apportionment. The opinion of the profession and the sober second thought of the country have approved the judgment of the court. The requirement that direct taxes must be "laid in proportion to the census or enumeration" is not violated by a statutory imposition of a penalty for non-payment of the tax;[67] and the amount of penalty to be enforced is a matter within legislative discretion.[68]

Requirement of uniformity.

19. "All duties, imposts, and excises shall be uniform throughout the United States."[69] The requirement of uniformity means that there must be geographical uniformity, or, in other words, that "wherever a subject is

[67] De Treville *v.* Smalls, 98 U. S. 517.
[68] W. U. T. Co. *v.* Indiana, 165 U. S. 304.
[69] Article I, Sec. 8, Par. 1.

taxed anywhere, the same must be taxed everywhere throughout the United States, and at the same rate,"[70] and taxation is uniform, when it operates with the same effect in all places where the subject of taxation is found, though that subject be not equally distributed in all parts of the United States.[71] Subjects of taxation may, in the discretion of Congress, be classified without impairment of uniformity, and, while the theory is that such classification should not be arbitrary, but must be based upon grounds of real distinction, yet, in view of the progressive inheritance tax cases,[72] it would be difficult to make a classification sufficiently arbitrary to justify a judicial determination that the classification violates the rule of uniformity. Sales of property at "any exchange, or board of trade, or other similar place" may be taxed, when sales otherwise made are not taxed.[73] Inheritances may be taxed, even though the rate of taxation progressively increase according to the value and amount of the devise, bequest, or distributive share, and though there be discrimination in the rate as between lineals, collaterals, and strangers; and, under the statute,[74] the subject of taxation is not the corpus of the estate, but the amount of each particular devise, bequest, or distributive share.[75] Though free from objection on constitutional grounds, the progressive inheritance tax law is a very objectionable exercise of legislative discretion, for it violates the fundamental American doctrine that all men are equal before the law, and that equality of rights implies equality of obligations, and it is of dangerous import in that it teaches the many

[70] Knowlton *v.* Moore, 178 U. S. 41, 84, per White, J.
[71] The Head Money Cases, 112 U. S. 580.
[72] Knowlton *v.* Moore, 178 U. S. 41; Murdock *v.* Ward, *ibid.* 139.
[73] Nicol *v.* Ames, 173 U. S. 509.
[74] Act of 13th June, 1898, 30 Stat. 448, c. 448.
[75] Knowlton *v.* Moore, 178 U. S. 41.

to expect that the necessary expenditures of government will be met by taxation to be levied on the few.

Taxation in the territories.

20. Long ago the court said in an unanimous judgment,[76] pronounced by Marshall, C. J., "Does this term 'the United States,' designate the whole, or any particular portion, of the American Empire? Certainly this question can admit of but one answer. It is the name given to our great republic, which is composed of states and territories. The District of Columbia, or the territory west of the Missouri, is not less within the United States than Maryland or Pennsylvania; and it is not less necessary, on the principles of our Constitution, that uniformity in the imposition of imposts, duties, and excises, should be observed in the one than in the other." This expression of opinion by the greatest of the judicial commentators on the Constitution was not a dictum, *obiter* or otherwise, but was a statement of the rule of law which was applied to, and which decided, the case before the court. Nevertheless that case has been, in effect though not in form, overruled, for it has been decided by a divided court, four justices dissenting and the five justices constituting the majority agreeing only in the judgment, and differing widely in the reasoning upon which it rests, that the Act of 12th April, 1900,[77] imposing for a limited period certain duties upon importations into ports of the United States from Porto Rico, and into ports of Porto Rico from the United States, differing from the duties imposed upon importations into the United States from foreign countries, is constitutional, and that, from and after the taking effect of that act, the duties thereby imposed were rightfully collected.[78] The

[76] Loughborough *v.* Blake, 5 Wheat. 317.
[77] 31 Stat. 77, c. 191.
[78] Downes *v.* Bidwell, 182 U. S. 244.

judgment in that case is, therefore, authority for the proposition that after a territory has been acquired by treaty and has so far become a part of the United States that goods brought from it to ports of the United States are not subject to the duties imposed by the laws of the United States upon importations from foreign countries,[79] Congress may, by subsequent legislation, organize it as a territory of the United States, and by the same act impose upon it taxation by tariff which if imposed upon any state or upon any territory on the continent of North America would be confessedly unconstitutional, because a violation of the rule of uniformity. That the justices who concurred in the judgment did not agree in the reasoning upon which that judgment is based does not detract from the authority of the case as a binding precedent, for, as Marshall, C. J., said,[80] "The authority of a decision is coextensive with the facts upon which it is founded." Mr. Justice Brown bases the judgment upon the proposition that in the uniformity clause the words "throughout the United States" do not include territories acquired by treaty or conquest, except in so far as Congress shall direct. Mr. Justice White, Mr. Justice Shiras, and Mr. Justice McKenna base it on the theory that while territory may be acquired by treaty, and thereby become the property of the United States, it does not become territory of the United States subject to constitutional restraints upon congressional action until it shall have been "incorporated" with the United States by an act of Congress. Mr. Justice Gray, concurring in the judgment of affirmance, and in substance concurring in the opinion of Mr. Justice White, also held that territory acquired by conquest or cession does not become domestic territory in the sense of

[79] De Lima *v.* Bidwell, 182 U. S. 1; Fourteen Diamond Rings, Pepke, Claimant, *v.* U. S., 183 *id.* 176.

[80] Ogden *v.* Saunders, 12 Wheat. 333.

the revenue laws, and that Congress may establish a temporary government therefor, "which is not subject to all the restrictions of the Constitution." Mr. Chief Justice Fuller, Mr. Justice Brewer, and Mr. Justice Peckham dissented, and held that the powers granted by the Constitution and the restrictions upon the exercise of those powers extend to every part of the territory of the United States. Mr. Justice Harlan concurred in the dissenting opinion of the chief justice, and held that "Congress has no existence and can exercise no authority outside of the Constitution," and he agreed with the chief justice in his opposition to the view that Porto Rico has not been "incorporated" into the United States.

Exemption of state agencies from taxation by the United States.

21. The United States cannot tax the agencies of a state, as, for instance, the salary of a judicial officer of a state,[81] nor the revenue of a municipal corporation derived from its loan of capital to a railway;[82] nor may it tax, in the hands of an individual, the income from municipal bonds.[83] But the federal government may tax a bequest to a municipality for public purposes, although the tax incidentally reduces the amount of the bequest to that municipality.[84]

Charges which are not taxes exempt from constitutional restraints.

22. The duty on the transportation of passengers by sea from foreign countries imposed by the United States

[81] The Collector *v.* Day, 11 Wall. 113.

[82] U. S. *v.* B. & O. R., 17 Wall. 322.

[83] Pollock *v.* F. L. & T. Co., 158 U. S. 601. On taxation of state agencies in general, see Ambrosini *v.* U. S., 187 *id.* 1.

[84] Snyder *v.* Bettman, 190 U. S. 249. Three justices dissented.

in the exercise of the power of regulating commerce, not being in its nature a tax, is not subject to the constitutional restrictions on the exercise of the power of taxation;[85] and the same view has been taken of the tax imposed by the United States on the circulating notes of state banks for the purpose of preventing the circulation of any other than national bank notes.[86]

Taxation by the states.

23. A state may, so far as it is not restrained by the Constitution, tax all persons, natural or corporate, and all property, real or personal, within its territory and subject to its sovereignty, and may regulate, in the exercise of legislative discretion, the manner of levying and collecting its taxes,[87] and the United States cannot, either by legislative or judicial action, afford any relief against

[85] The Head Money Cases, 112 U. S. 580.

[86] Veazie Bank *v.* Fenno, 8 Wall. 533. See also Twin City Bk. *v.* Nebeker, 167 U. S. 196.

[87] Witherspoon *v.* Duncan, 4 Wall. 210; Spencer *v.* Merchant, 125 U. S. 345; P. P. C. Co. *v.* Pennsylvania, 141 *id.* 18; W. U. T. Co. *v.* Indiana, 165 *id.* 304; A. Ex. Co. *v.* Ohio, 166 *id.* 185; Savings Society *v.* Multnomah County, 169 *id.* 421; Magoun *v.* I. T. & S. Bank, 170 *id.* 283; King *v.* Mullins, 171 *id.* 404; New Orleans *v.* Stempel, 175 *id.* 309; Bristol *v.* Washington County, 177 *id.* 133; Orr *v.* Gilman, 183 *id.* 278; F. C. & P. R. *v.* Reynolds, *ibid.* 471; League *v.* Texas, 184 *id.* 156; Blackstone *v.* Miller, 188 *id.* 189; Board of Assrs. *v.* C. N. D'E., 191 *id.* 388; Carstairs *v.* Cochran, 193 *id.* 10. See also opinion of Brown, J., in Eidman *v.* Martinez, 184 *id.* 578. A state may tax an interstate railway, car, express, or telegraph company upon its property within the state, finding the value of the whole property, both tangible and intangible, of the corporation, which is used in its business, and then computing the value of the line within the state by its relative length to the whole: P., C., C. & St. L. Ry. *v.* Backus, 154 U. S. 421; C., C., C. & St. L. Ry. *v.* Backus, *ibid.* 439; P. P. C. Co. *v.* Pennsylvania, 141 *id.* 18; A. R. T. Co. *v.* Hall, 174 *id.* 70; U. R. T. Co. *v.* Lynch, 177 *id.* 149; A. Ex. Co. *v.* Ohio, 165 *id.* 194, 166 *id.* 185; A. Ex. Co. *v.* Kentucky, 166 id. 171; W. U. T. Co. *v.* Massachusetts, 125 *id.* 530; W. U. T. Co. *v.* Taggart, 163 *id.* 1; and see W. U. T. Co. *v.* Missouri, 190 *id.* 412. But in estimating the value of the whole property the state may not include property in another state which is not used by the company in its business: Fargo *v.* Hart, 193 *id.* 490.

"state taxation, however unjust, oppressive, or onerous," so long as that taxation "does not entrench upon the legitimate authority of the Union, or violate any right recognized or secured by the Constitution of the United States." [88]

Under the general rule which permits a government to tax all persons and property within its jurisdiction, the states may impose a succession duty on the devolution of title to real estate from their citizens to alien non-residents; [89] they may tax descents and inheritances, and they may classify and vary the rate of taxation with reference to lineal and collateral relationship, strangers, and the amount of the legacy; [90] they may tax goods and chattels which are actually within the state when assessed for taxation, though owned by a non-resident; [91] they may tax mortgages of lands within their limits, and notes secured by such mortgages, although held by residents of other states; [92] they may tax the transfer by will of money deposited within the state by a non-resident; [93] and, for

[88] Providence Bk. *v.* Billings, 4 Pet. 563; Carpenter *v.* Pennsylvania, 17 How. 456; St. Louis *v.* W. F. Co., 11 Wall. 423; The State Tax on Foreign-held Bonds, 15 *id.* 300; Kirtland *v.* Hotchkiss, 100 U. S. 491, 498; M. G. Co. *v.* Shelby County, 109 *id.* 398; Magoun *v.* I. T. & S. Bank, 170 *id.* 283; Orr *v.* Gilman, 183 *id.* 278; Blackstone *v.* Miller, 188 *id.* 189. The Fourteenth Amendment does not compel the states to adopt an iron rule of equal taxation: B. G. R. *v.* Pennsylvania, 134 U. S. 232; P. Ex. Co. *v.* Seibert, 142 *id.* 339; Jennings *v.* C. R. C. Co., 147 *id.* 147; Giozza *v.* Tiernan, 148 *id.* 657; Merchants & Manufacturers' Bk. *v.* Pennsylvania, 167 *id.* 461; Magoun *v.* I. T. & S. Bank, 170 *id.* 283; Clark *v.* Titusville, 184 *id.* 329; Kidd *v.* Alabama, 188 *id.* 730. See also F. C. & P. R. *v.* Reynolds, 183 *id.* 471; Connolly *v.* U. S. P. Co., 184 *id.* 540; Missouri *v.* Dockery, 191 *id.* 165.

[89] Mager *v.* Grima, 8 How. 490.

[90] Magoun *v.* I. T. & S. Bank, 170 U. S. 283. See also Billings *v.* Illinois, 188 *id.* 97.

[91] Coe *v.* Errol, 116 U. S. 517.

[92] Savings Society *v.* Multnomah County, 169 U. S. 421; New Orleans *v.* Stempel, 175 *id.* 309; Bristol *v.* Washington County, 177 *id.* 133. See also Board of Assessors *v.* C. N. D'E., 191 *id.* 388.

[93] Blackstone *v.* Miller, 188 U. S. 189.

purposes of taxation, the *situs* of a debt being the residence of the creditor, the state may include in the taxable property of a resident so much of the registered public debt of another state as such resident may hold, although the debtor state may either exempt it from taxation or actually tax it.[94] On the same principle, a state may tax her resident citizens for debts due to them by a non-resident and secured by his bond and also by his deed of trust or mortgage of real estate situated in another state.[95] As, until the period of distribution arrives, the law of a decedent's domicile attaches to his personal property, that property is subject to a state collateral inheritance tax, though bequeathed by his will to non-resident legatees.[96] But the laws of a state can have no extra-territorial effect, and, therefore, a state cannot tax a franchise granted by, and exercised in, another state,[97] nor can it, as a means of taxing corporate bonds held by non-residents, authorize the corporation to retain from the interest due on its bonds the amount of the tax.[98] Nor can a state tax, in the hands of a non-resident holder, corporate bonds issued under a mortgage of a railway formed by the consolidation of corporations, incorporated by the state, and other corporations incorporated by another state, and encumbering by a consolidated and non-severable lien property which is not within the jurisdiction of the taxing state.[99] Nor can a state compel a foreign corporation to collect its taxes by retaining a portion of the interest due upon scrip or bonds held by citizens of the taxing state,

[94] Bonaparte *v.* Tax Court, 104 U. S. 592.

[95] Kirtland *v.* Hotchkiss, 100 U. S. 491.

[96] Carpenter *v.* Pennsylvania, 17 How. 456; U. S. *v.* Perkins, 163 U. S. 625.

[97] L. & J. F. Co. *v.* Kentucky, 188 U. S. 385.

[98] State Tax on Foreign-held Bonds, 15 Wall. 301; *cf.* Savings Society *v.* Multnomah County, 169 U. S. 421, 428.

[99] R. Co. *v.* Jackson, 7 Wall. 262.

when the payment is made by the foreign corporation in its home state.[100] A state may tax corporate bonds at their face, instead of their market, value.[1]

Expressed restraints upon state taxation.

24. Section 10 of Article I of the Constitution declares, that "no state shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws; and the net produce of all duties and imposts, laid by any state on imports or exports, shall be for the use of the treasury of the United States; and all such laws shall be subject to the revision and control of the Congress. No state shall, without the consent of the Congress, lay any duty of tonnage." The nature and effect of the restrictions upon the taxing power of the states imposed by these constitutional provisions are more fully discussed in Chapter IV, and it is sufficient to say in this connection that a state cannot require importers of foreign goods by the bale or package and wholesale vendors of such goods to pay a license fee;[2] nor can a state impose an *ad valorem* tax on imported goods remaining in their original cases in the hands of the importer;[3] nor can a state tax an auctioneer's sales of imported goods for account of the importers;[4] but a state may prohibit the exportation of tobacco grown within its territory, save after

[100] N. Y., L. E. & W. R. *v.* Pennsylvania, 153 U. S. 628; D. & H. C. Co. *v.* Pennsylvania, 156 *id.* 200.

[1] B. G. R. *v.* Pennsylvania, 134 U. S. 222; Jennings *v.* C. R. C. Co., 147 *id.* 147.

[2] Brown *v.* Maryland, 12 Wheat. 419. Imports, in the constitutional sense, embrace only goods brought from a foreign country: A. S. & W. Co. *v.* Speed, 192 U. S. 500.

[3] Low *v.* Austin, 13 Wall. 29; *cf.* P. & S. C. Co. *v.* Bates, 156 *id.* 577.

[4] Cook *v.* Pennsylvania, 97 U. S. 566.

inspection and on payment of a tax.[5] A state cannot tax ships upon their tonnage.[6]

Implied restraint upon state taxation resulting from the federal supremacy.

25. The supremacy of the United States under the Constitution impliedly limits to some extent the exercise by the states of the power of taxation. Thus, a state cannot tax the official salary of an officer of the United States, as, for instance, an officer in the revenue marine service;[7] nor can a state tax a telegraph company upon messages sent by officers of the United States on public business;[8] nor can a state authorize municipal taxation of the bonds issued by the government of the United States for money loaned to it;[9] nor can a state tax the notes of the United States;[10] nor can a state tax so much of the capital of a state bank as is invested in the bonds of the United States, that capital being assessed either at its actual value,[11] or at a valuation equal to the amount paid in, or secured to be paid in.[12] But no one will be allowed to evade state taxation of his money on deposit by making a temporary investment of that money in the notes of the United States.[13] A corporation claiming an exemption from state taxation by reason of the investment of its surplus funds in the legal tender notes of the United States has,

[5] Turner *v.* Maryland, 107 U. S. 38.

[6] State Tonnage Tax Cases, 12 Wall. 204; Steamship Co. *v.* Portwardens, 6 *id.* 31; Peete *v.* Morgan, 19 *id.* 581; Cannon *v.* New Orleans, 20 *id.* 577; I. S. S. Co. *v.* Tinker, 94 U. S. 238.

[7] Dobbins *v.* Commissioners, 16 Pet. 435.

[8] W. U. T. Co. *v.* Texas, 105 U. S. 460.

[9] Weston *v.* Charleston, 2 Pet. 449; Banks *v.* Mayor, 7 Wall. 16; *cf.* Plummer *v.* Coler, 178 U. S. 115.

[10] Bank *v.* Supervisors, 7 Wall. 26.

[11] People *v.* Commissioners of Taxes, 2 Black, 620.

[12] Bank Tax Case, 2 Wall. 200.

[13] Shotwell *v.* Moore, 129 U. S. 590.

of course, the burden of proving the fact on which it rests its claim for exemption.[14] A state tax of a certain percentage of the total amount of the deposits on a given day,[15] or of the average amount of the deposits for a fixed period,[16] of a saving fund society chartered by the state, a state tax of a certain percentage upon the excess of the market value of the shares of the capital of a corporation chartered by a state over and above the value of its real estate and machinery,[17] and a state tax, measured by dividends, upon a foreign corporation doing business within the state,[18] are, in each case, a tax on the franchise and not on the property of the corporation, and the corporation cannot claim exemption from such taxation by reason of the investment, in the case of the saving funds, of their deposits, and in the case of the other corporations, of their capital and assets, in the bonds of the United States. So also a state, in taxing the shares of stock of a trust company, may include in the valuation of the shares the amount of the capital stock of the company which is invested in the bonds of the United States.[19] A state may tax a legacy consisting of bonds of the United States issued under a statute declaring them to be exempt from taxation in any form,[20] and it may tax bequests to the United States.[21] It cannot tax lands held in severalty by members of an Indian tribe and protected by treaties between the United States and the tribe,[22] and it cannot tax lands held by the United States in trust for members of an

[14] C. & B. Co. *v.* New Orleans, 99 U. S. 97.
[15] Society for Savings *v.* Coite, 6 Wall. 594.
[16] Provident Inst. *v.* Massachusetts, 6 Wall. 611.
[17] Hamilton Co. *v.* Masachusetts, 6 Wall. 632.
[18] Home Ins. Co. *v.* New York, 134 U. S. 594.
[19] C. T. Co. *v.* Lander, 184 U. S. 111.
[20] Plummer *v.* Coler, 178 U. S. 115.
[21] U. S. *v.* Perkins, 163 U. S. 625.
[22] The Kansas Indians, 5 Wall. 737; The New York Indians, *ibid.* 761.

Indian tribe, or improvements upon such lands, or property given to the Indians by the United States, when such taxation is prohibited by federal statute.[23] It may, by act of Congress, tax surveyed but unpatented lands of the United States included within a railroad land grant.[24] Lands granted by act of Congress to a state, to be held by it to aid in the construction of a railway, though not taxable by the state when held by it as trustee, are taxable by it after their conveyance to the railway,[25] and, of course, in the case of lands ceded by a state to the United States for the construction of a railway, with an express reservation of the state's right of taxation, the state may lawfully exercise that right,[26] but land within a state, which, under laws of Congress for the collection of taxes due to the United States, has been sold for non-payment of such taxes, and at the sale thereof purchased by the United States and afterwards sold by the United States to a third party, or redeemed by the owner, is exempt from state taxation during the period of federal ownership thereof.[27] Although the title to land remain in the United States, ore dug therefrom under a mineral claim is, as the personal property of the claimant, subject to state taxation.[28] The exemption of federal agencies from state taxation is dependent, not on the fact of the agency, nor on the character of the agents, nor on the mode of their appointment, but on the effect of state interference in depriving the agent of power to serve the government of the United States, or in hindering the agent in the efficient exercise of that

[23] U. S. *v.* Rickert, 188 U. S. 432.

[24] Act of 10th July, 1886, 24 Stat. 143, c. 764; C. P. R. *v.* Nevada, 162 U. S. 512; N. P. R. *v.* Myers, 172 *id.* 589.

[25] Tucker *v.* Ferguson, 22 Wall. 527.

[26] F. L. R. *v.* Lowe, 114 U. S. 525.

[27] Van Brocklin *v.* Tennessee, 117 U. S. 151.

[28] Forbes *v.* Gracey, 94 U. S. 762.

power.[29] A state may, therefore, tax the property, real and personal, of a railroad, which has been chartered by act of Congress, is subject to a lien securing its debt to the United States, and is used as a federal agency for the transportation of mails, soldiers, government supplies, and munitions of war;[30] and, it would seem, on the principle of that case, that a state may tax the property of any federal agency, wherever such taxation does not impair the efficiency of the agency in the performance of its duty to the government of the United States. The federal supremacy forbids a state so to tax the transit of passengers through the state by the ordinary modes of travel, as to impede their approach to the seat of government of the United States, the ports of entry through which commerce is conducted, and the various federal offices in the states.[31] The supremacy of the United States does not involve an exemption from state taxation of property which has been acquired by the exercise of an exclusive privilege granted by the United States, when there is no relation of agency between the United States and the grantee; thus letters patent, granted by the United States, do not exempt from state taxation the tangible property in which the invention or discovery is embodied.[32] Nor does a license granted, on payment of a license fee, by the United States under its internal revenue statutes to a wholesale liquor dealer in a state exempt the dealer, or his business, or his goods from state control, regulation, or taxation.[33]

[29] U. P. R. *v.* Peniston, 18 Wall. 5; National Bank *v.* Commonwealth, 9 *id.* 353; Thomson *v.* P. R., *ibid.* 579; C. P. R. *v.* California, 162 U. S. 91.

[30] U. P. R. *v.* Peniston, 18 Wall. 5.

[31] Crandall *v.* Nevada, 6 Wall. 35.

[32] Webber *v.* Virginia, 103 U. S. 344.

[33] McGuire *v.* The Commonwealth, 3 Wall. 387; Pervear *v.* The Commonwealth, 5 *id.* 475. See also Plumley *v.* Massachusetts, 155 U. S. 461.

Taxation of national banks.

26. A state cannot tax the operations of banks incorporated by the government of the United States as fiscal agencies.[34] Nor can a state tax the assets of an insolvent national bank in the hands of a receiver appointed under the provisions of the national banking laws.[35] Of course, when Congress licenses state taxation of agencies of the government of the United States, such taxation is permissible within the limits imposed by the terms of the license;[36] thus in the case of national banks, state taxation is by Section 41 of the Act of 3d June 1864,[37] permitted as to the shares in any bank, when "included in the valuation of the personal property of the owner or holder of such shares, in assessing taxes imposed by authority of the state within which the association is located, . . . subject only to the restrictions, that the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such state, and that the shares of any national banking association owned by non-residents of any state shall be taxed in the city or town where the bank is located, and not elsewhere." The states may, therefore, tax shareholders in national banks within the limits of this license,[38] without regard to the investment of all or any part of the capital of the banks in United States securities. The National Bank Act of 3d June, 1864,[39] had imposed a further restriction on state taxation of national bank shares, declaring that such tax

[34] McCulloch *v.* The State of Maryland, 4 Wheat. 316; Osborn *v.* The Bank of the U. S., 9 *id.* 738.

[35] Rosenblatt *v.* Johnston, 104 U. S. 462.

[36] Van Allen *v.* The Assessors, 3 Wall. 573; People *v.* The Commissioners, 4 *id.* 244. See also C. T. Co. *v.* Lander, 184 U. S. 111.

[37] 15 Stat. 34, Rev. Stat., sec. 5219.

[38] National Bank *v.* The Commonwealth, 9 Wall. 353; People *v.* Commissioners, 4 *id.* 244; Van Allen *v.* The Assessors, 3 *id.* 573.

[39] 13 Stat. 111.

"shall not exceed the rate imposed upon the shares in any of the banks organized under the authority of the state," but in the re-enactment of this statute in 1868,[40] and in the Revised Statutes,[41] this condition was omitted. Under the Act of 1864 it was held that a state could not tax shares in national banks, when it taxed the capital of state banks, exempting so much thereof as was invested in the bonds of the United States, and failed to tax the shares of state banks.[42] It was also held that the limitation upon disparity of state taxation imposed by the Act of 1864 is not overstepped by a state which, having only two banks of issue and circulation, and having by contract bound itself not to tax these banks beyond a certain limit, but having numerous banks of deposit, which do not issue circulation, taxes generally and equally all shares of stock in banks and incorporated companies doing business in the state.[43] The terms of Section 5219 of the Revised Statutes show clearly that Congress did not intend to curtail the taxing power of the states over national bank shares as entities distinct from the capital of the banks, and as the property of persons subject to state jurisdiction, but that it was intended to guard the national banks against unfriendly discrimination by the states in the exercise of that taxing power.[44] The phrase "moneyed capital" includes capital employed in national banks and capital employed by individuals for the making of profit by its use, but it does not include non-competitive capital.[45] The exemption

[40] 15 Stat. 34.

[41] Section 5219.

[42] Van Allen *v.* The Assessors, 3 Wall. 573; Bradley *v.* The People, 4 *id.* 459.

[43] Lionberger *v.* Rouse, 9 Wall. 468.

[44] Adams *v.* Nashville, 95 U. S. 19; Mercantile Bank *v.* New York, 121 *id.* 138. See the opinion of Miller, J., in Davenport Bank *v.* Davenport, 123 *id.* 83.

[45] Mercantile Bank *v.* New York, 121 U. S. 138; Palmer *v.* McMahon, 133 *id.* 660; National Bank *v.* Chapman, 173 *id.* 205.

from state taxation of some but not all of the moneyed capital in the state is not a discrimination against national bank shares within the terms of the license; as, for instance, in the case of exemption of "all mortgages, judgments, recognizances, and moneys owing upon articles of agreement for the sale of real estate;"[46] or of deposits in savings banks, shares in trust companies, and shares in other moneyed or stock corporations chartered by the state and deriving an income or profit from the use of their capital or otherwise.[47] Nor is there any inequality of taxation or unfriendly discrimination as against national bank shares, in the exemption by a state of that which it cannot lawfully tax, such as shares owned by its residents in the capital stock of foreign corporations,[48] or in the exemption of that which is not a subject of taxation by the United States, such as the bonds of a municipal corporation created by the state;[49] but where a very material part of the other moneyed capital of a state in the hands of individual citizens within the state is exempted from state taxation, the state cannot tax the shares of national banks.[50] State statutes taxing personal property, including national bank shares, and permitting the party taxed to deduct his just debts from the valuation of his personal property other than national bank shares, tax such shares at a greater rate than other moneyed capital, and, therefore, are not effective under the terms of the license given by Congress;[51] but in the case of a national

[46] Hepburn *v.* The School Directors, 23 Wall. 480.

[47] Mercantile Bank *v.* New York, 121 U. S. 138; Bank of Redemption *v.* Boston, 125 *id.* 60; Palmer *v.* McMahon, 133 *id.* 660; First National Bank *v.* Ayers, 160 *id.* 660; Aberdeen Bank *v.* Chehalis County, 166 *id.* 440; National Bank *v.* Chapman, 173 *id.* 205.

[48] Mercantile Bank *v.* New York, 121 U. S. 138, 162.

[49] Mercantile Bank *v.* New York, 121 U. S. 138, 162.

[50] Boyer *v.* Boyer, 113 U. S. 689; *cf.* Commercial Bank *v.* Chambers, 182 *id.* 556.

[51] People *v.* Weaver, 100 U. S. 539; Supervisors *v.* Stanley, 105 *id.* 305;

bank shareholder who has no just debts to deduct, the taxing law is valid and operative.[52] A state may, under the act of Congress, tax the shares of a bank located within its jurisdiction without regard to the non-resident or resident ownership of such shares,[53] and the shares may be assessed for purpose of state taxation at their market value, though that exceed their par value.[54] But state taxation of national bank shares must be uniform and equal, and when a system of valuation for taxation purposes intended to operate unequally is adopted by the state authorities whose duty it is to make the assessment, equity may properly interfere, on payment of the proper tax, to enjoin the collection of the illegal excess.[55] Where a state has provided a mode for the correction of error in the assessment of property for purposes of taxation, a party aggrieved by an over-valuation of his property cannot maintain an action at law to recover the alleged illegal excess of taxes paid by him, for the official action of the revising authority is judicial in character, and cannot be collaterally impeached.[56] Only the shares of stock and the real estate of a bank may be taxed.[57] A state may lawfully require a national bank to act as the agent of the state in collecting from the shareholders of the bank the tax imposed by the state within the limits

Hills *v.* Exchange Bank, *ibid.* 319; Evansville Bank *v.* Britton, *ibid.* 322; Whitbeck *v.* Mercantile Bank, 127 *id.* 193; Palmer *v.* McMahon, 133 *id.* 660.

[52] Supervisors *v.* Stanley, 105 U. S. 305.

[53] Tappan *v.* Merchants' Nat. Bank, 19 Wall. 490.

[54] Hepburn *v.* The School Directors, 23 Wall. 480; People *v.* Commissioners of Taxes, 94 U. S. 415.

[55] Cummings *v.* National Bank of Toledo, 101 U. S. 153; Pelton *v.* National Bank, 101 *id.* 143; People *v.* Weaver, 100 *id.* 539; Whitbeck *v.* Mercantile Bank, 127 *id.* 193.

[56] Stanley *v.* Supervisors, 121 U. S. 535.

[57] Owensboro Nat. Bank *v.* Owensboro, 173 U. S. 664; First Nat. Bank of Louisville *v.* Louisville, 174 *id.* 438.

permitted by the act of Congress.[58] A state may also, under a penalty for his non-performance of the duty, require a cashier of a national bank to furnish to the state authorities a list of the names and respective holdings of the shareholders of his bank.[59]

State taxation as affected by the prohibition of the impairment of the obligation of contracts.

27. The constitutional prohibition of the enactment by the states of laws impairing the obligation of contracts affects to some extent the exercise by the states of the power of taxation. While, as a general rule, the states may, in the exercise of legislative discretion, either tax property or exempt it from taxation, yet contracts of exemption from state taxation, not in terms contravening federal [60] or state [61] constitutional prohibitions, and contained in corporate charters [62] or stipulated by express agreement,[63] if supported by an adequate consideration, constitute contracts so binding upon the state, that their obligation is not to be permitted to be impaired by a subsequent legislative repeal of the charter, or by an imposition of a rate of taxation inconsistent with the state's contract.[64] But there cannot be implied from the

[58] Aberdeen Bank *v.* Chehalis County, 166 U. S. 440; Merchants & Manufacturers' Bank *v.* Pennsylvania, 167 *id.* 461.

[59] Waite *v.* Dowley, 94 U. S. 527.

[60] People *v.* Commissioners of Taxes, 94 U. S. 415.

[61] R. Cos. *v.* Gaines, 97 U. S. 697; Trask *v.* Maguire, 18 Wall. 391; Morgan *v.* Louisiana, 93 U. S. 217; Shields *v.* Ohio, 95 *id.* 319; P. I. Co. *v.* Tennessee, 161 *id.* 193; Stearns *v.* Minnesota,, 179 *id.* 223, 241.

[62] Jefferson Branch Bank *v.* Skelly, 1 Bl. 436; M. & O. R. *v.* Tennessee, 153 U. S. 486; Citizens' Bk. *v.* Parker, 192 *id.* 73.

[63] New Jersey *v.* Wilson, 7 Cr. 164; New Jersey *v.* Yard, 95 U. S. 104; Wells *v.* Savannah, 181 *id.* 531.

[64] Jefferson Branch Bank *v.* Skelly, 1 Bl. 436; W. & R. R. *v.* Reid, 13 Wall. 264; R. & G. R. *v.* Reid, *ibid.* 269; Chicago *v.* Sheldon, 9 *id.* 50; P. R. *v.* Maguire, 20 *id.* 36; University *v.* People, 99 U. S. 309; Asylum *v.* New Orleans, 105 *id.* 362; W. & W. R. *v.* Alsbrook, 146 *id.* 279; M. & O.

grant of a charter an exemption of the corporate franchise or property from state taxation,[65] and the imposition in a charter of a specific form or rate of taxation is not, in the absence of an express contract of exemption from other taxation, to be construed as an implied exemption from such other taxation,[66] and contracts of exemption from state taxation, when expressly made, are to be strictly construed.[67] Immunity from taxation is a personal privilege which does not extend beyond the immediate grantee unless it is otherwise so declared in express terms.[68] A municipal corporation cannot, by the exercise of a statutory power of taxation, diminish the interest payable to the holder of a funded obligation of the municipality under the terms of the bond.[69] The subject of exemption

R. *v.* Tennessee, 153 *id.* 486; New Orleans *v.* Citizens' Bank, 167 *id.* 371; Stearns *v.* Minnesota, 179 *id.* 223.

[65] Providence Bank *v.* Billings, 4 Pet. 514; Tucker *v.* Ferguson, 22 Wall. 527; M. G. Co. *v.* Shelby County, 109 U. S. 398.

[66] The Delaware R. Tax, 18 Wall. 206; Erie Ry. *v.* Penna., 21 *id.* 492; The License Tax Cases, 5 *id.* 462; Home Ins. Co. *v.* Augusta, 93 U. S. 116; S. C. S. Ry. *v.* Sioux City, 138 *id.* 98; N. O. C. & L. R. *v.* New Orleans, 143 *id.* 192; W. & W. R. *v.* Alsbrook, 146 *id.* 279; Shelby County *v.* Union & Planters' Bank, 161 *id.* 149; New Orleans *v.* Citizens' Bank, 167 *id.* 371.

[67] Tucker *v.* Ferguson, 22 Wall. 527; W. F. Co. *v.* East St. Louis, 107 U. S. 365; Ry. Co. *v.* Philadelphia, 101 *id.* 528; Tomlinson *v.* Branch, 15 Wall. 460; R. Cos. *v.* Gaines, 97 U. S. 697; Picard *v.* E. T., V. & G. R., 130 *id.* 637; Y. & M. V. R. *v.* Thomas, 132 *id.* 174; N. O. C. & L. R. *v.* New Orleans, 143 *id.* 192; W. & W. R. *v.* Alsbrook, 146 *id.* 279; W. & St. P. L. Co. *v.* Minnesota, 159 *id.* 526; P. F. & M. I. Co. *v.* Tennessee, 161 *id.* 174; C. R. & B. Co. *v.* Wright, 164 *id.* 327; C. & L. T. R. Co. *v.* Sandford, *ibid.* 578; Ford *v.* D. & P. L. Co., *ibid.* 662; Citizens' Savings Bank *v.* Owensboro, 173 *id.* 636; Wells *v.* Savannah, 181 *id.* 531; Orr *v.* Gilman, 183 *id.* 278; Chicago Theological Seminary *v.* Illinois, 188 *id.* 662.

[68] Picard *v.* E. T., V. & G. R., 130 U. S. 637; People *v.* Cook, 148 *id.* 397; K. & W. R. *v.* Missouri, 152 *id.* 301; St. L. & S. F. Ry. *v.* Gill, 156 *id.* 649; N. & W. R. *v.* Pendleton, *ibid.* 667; P. F. & M. I. Co. *v.* Tennessee, 161 *id.* 174; Memphis Bank *v.* Tennessee, *ibid.* 186; P. I. Co. *v.* Tennessee, *ibid.* 193; C. & L. T. Co. *v.* Sandford, 164 *id.* 578; G. & S. I. R. *v.* Hewes, 183 *id.* 66; N. C. Ry. *v.* Maryland, 187 *id.* 258.

[69] Murray *v.* Charleston, 96 U. S. 432.

by contract from state taxation is more fully discussed in Chapter V.

State taxation as affected by the grant to Congress of the power of regulating commerce.

28. The constitutional grant to Congress of the power of regulating "commerce with foreign nations, and among the several states, and with the Indian tribes" also affects to some extent the exercise by the states of the power of taxation, but the states are not prohibited from taxing either the instrumentalities, or the subjects, of foreign or interstate commerce, provided that such taxation be imposed on those instrumentalities and subjects as component parts of the mass of property in the state, or by reason of the citizenship of their owners as subjects of the sovereignty of the state, and provided also, that that which is in form taxation, be not in substance a regulation of, or a restraint upon, foreign or interstate commerce.[70] In accordance with this distinction, a state may tax ships and ferry boats as the personal property of their owners, where either the owner, by reason of his residence, or the property because of its *situs* is subject to the taxing power of the state;[71] and a state may tax goods brought from another state and mingled with the mass of property in the taxing state,[72] and goods within

[70] Gibbons *v.* Ogden, 9 Wheat. 201; The Passenger Cases, 7 How. 479; Transportation Co. *v.* Wheeling, 99 U. S. 280; W. F. Co. *v.* East St. Louis, 107 *id.* 374; California *v.* C. P. R., 127 *id.* 1; Brimmer *v.* Rebman, 138 *id.* 78; Massachusetts *v.* W. U. T. Co., 141 *id.* 40; P. T. C. Co. *v.* Adams, 155 *id.* 688; P. & S. C. Co. *v.* Louisiana, 156 *id.* 590; W. U. T. Co. *v.* Taggart, 163 *id.* 1; A. Ex. Co. *v.* Ohio, 165 *id.* 194, 166 *id.* 185; New York *v.* Roberts, 171 *id.* 658; P., C., C. & St. L. Ry. *v.* Board of Pub. Works, 172 *id.* 32; K. & H. Bridge Co. *v.* Illinois, 175 *id.* 626; U. R. T. Co. *v.* Lynch, 177 *id.* 149.

[71] W. F. Co. *v.* East St. Louis, 107 U. S. 365; T. Co. *v.* Wheeling, 99 *id.* 273.

[72] Woodruff *v.* Parham, 8 Wall. 123; Brown *v.* Houston, 114 U. S. 622;

the state intended for transportation to another state but not actually stated on their voyage;[73] provided, that the taxation is not so imposed as to discriminate against either the natural products of, or goods manufactured in, another state.[74] A state may require a foreign corporation which is engaged in interstate commerce to pay for the privilege of exercising the franchises of a corporation,[75] though not for the right of transporting interstate passengers,[76] within its borders. It may tax its own citizens for the prosecution of any particular business or profession within the state, unless that business be directly concerned with interstate commerce; thus, while a state may not tax drummers of goods made in other states,[77] it may tax persons who sell goods shipped to them from outside points,[78] and it may tax exchange brokers, despite the fact that bills of exchange are instruments of foreign and interstate commerce.[79] It may tax agents engaged in hiring labour-

P. & S. C. Co. *v.* Bates, 156 *id.* 577; A. S. & W. Co. *v.* Speed, 192 *id.* 500; *cf.* Kelley *v.* Rhoads, 188 *id.* 1.

[73] Coe *v.* Errol, 116 U. S. 517; D. M. Co. *v.* Ontonagon, 188 *id.* 82.

[74] Ward *v.* Maryland, 12 Wall. 418; Welton *v.* Missouri, 91 U. S. 275; Guy *v.* Baltimore, 100 *id.* 434; Webber *v.* Virginia, 103 *id.* 344; Walling *v.* Michigan, 116 *id.* 446; Robbins *v.* Shelby Co., 120 *id.* 489; Corson *v.* Maryland, *ibid.* 502; Asher *v.* Texas, 128 *id.* 129; Brennan *v.* Titusville, 153 *id.* 289; Stockard *v.* Morgan, 185 *id.* 27; Caldwell *v.* North Carolina, 187 *id.* 622; N. & W. Ry. *v.* Sims, 191 *id.* 441. But see Hinson *v.* Lott, 8 Wall. 148; Downham *v.* Alexandria Council, 10 *id.* 173; Machine Co. *v.* Gage, 100 U. S. 676; Tiernan *v.* Rinker, 102 *id.* 123; Ficklen *v.* Shelby County, 145 *id.* 1; Emert *v.* Missouri, 156 *id.* 296; Rash *v.* Farley, 159 *id.* 263; A. S. & W. Co. *v.* Speed, 192 *id.* 500.

[75] Maine *v.* G. T. Ry., 142 U. S. 217. Bradley, Harlan, Lamar, and Brown, JJ., dissented. See also Crutcher *v.* Kentucky, 141 *id.* 47; Ashley *v.* Ryan, 153 *id.* 436; N. Y., L. E. & W. R. *v.* Pennsylvania, 158 *id.* 431; New York *v.* Roberts, 171 *id.* 658.

[76] Allen *v.* P. P. C. Co., 191 U. S. 171.

[77] Robbins *v.* Shelby County, 120 U. S. 489; Asher *v.* Texas, 128 *id.* 129; Brennan *v.* Titusville, 153 *id.* 289; Stockard *v.* Morgan, 185 *id.* 27; Caldwell *v.* North Carolina, 187 *id.* 622.

[78] Machine Co. *v.* Gage, 100 U. S. 676; Emert *v.* Missouri, 156 *id.* 296; Rash *v.* Farley, 159 *id.* 263; A. S. & W. Co. *v.* Speed, 192 *id.* 500.

[79] Nathan *v.* Louisiana, 8 How. 73.

ers to be employed beyond the limits of the state, even though transportation must eventually take place as the result of such contracts;[80] but an agent employed solely in promoting the use of his line in interstate transportation cannot be taxed, for the business is directly connected with commerce and consists wholly in carrying it on.[81] It has the right to impose a license tax,[82] or a tax on receipts,[83] upon a company engaged in local commerce, although the company be also engaged in interstate business;[84] but it cannot impose such charges upon strictly interstate commerce.[85] It may, however, tax so much of the gross receipts of an interstate railroad company as are earned within the state.[86] If property within a state and otherwise liable to taxation be in money at the date of assessment for taxation, a subsequent investment thereof in a subject of commerce does not relieve that capital from liability to state taxation.[87] While a state cannot tax the interstate transportation of passengers or goods, it may by its charter of a railway charge a toll payable to the state for the use of the improved facilities of travel furnished by the railway,[88] and it may tax its railway companies upon the cash value of their capital stock.[89] It may tax an inter-

[80] Williams *v.* Fears, 179 U. S. 270.

[81] McCall *v.* California, 136 U. S. 104. See also N. & W. R. *v.* Pennsylvania, *ibid.* 114; Crutcher *v.* Kentucky, 141 *id.* 47.

[82] P. T. C. Co. *v.* Charleston, 153 U. S. 692; Osborne *v.* Florida, 164 *id.* 650; P. Co. *v.* Adams, 189 *id.* 420; Allen *v.* P. P. C. Co., 191 *id.* 171.

[83] Ratterman *v.* W. U. T. Co., 127 U. S. 411; W. U. T. Co. *v.* Alabama, 132 *id.* 472; P. Ex. Co. *v.* Seibert, 142 *id.* 339.

[84] A company which carries to or from a ferry passengers intending to go to another state, and which makes a separate charge for such service, is not engaged in interstate commerce, and a license tax upon such company is constitutional: New York *v.* Knight, 192 U. S. 21.

[85] Leloup *v.* Port of Mobile, 127 U. S. 640; Crutcher *v.* Kentucky, 141 *id.* 47.

[86] Maine *v.* G. T. Ry., 142 U. S. 217.

[87] People *v.* Commissioners, 104 U. S. 466.

[88] B. & O. R. *v.* Maryland, 21 Wall. 456.

[89] The Delaware R. Tax, 18 Wall. 206.

state railway, car, express, or telegraph company upon its property within the state, finding the value of the whole property, both tangible and intangible, of the corporation, which is used in its business, and then computing the value of the line within the state by its relative length to the whole.[90] On the other hand, a state may not tax sheep which are driven at reasonable speed across its territory, although they are allowed to graze on the way.[91] It may not tax ships and ferryboats which come within the jurisdiction in the prosecution of foreign or interstate commerce, unless the owner is by residence subject to the taxing power of the state.[92] Nor can a state tax the transportation of passengers coming by water into its ports from a foreign country or from another state;[93] nor can a state tax the interstate transportation of goods by water;[94] nor can a state impose port dues, that is, charges payable by all vessels, entering, remaining in, or leaving a port, without regard to services rendered to, or received by, the vessel;[95] nor can a state tax a telegraph company upon messages transmitted by it to points outside of the

[90] P., C., C. & St. L. Ry. *v.* Backus, 154 U. S. 421; C., C., C. & St. L. Ry. *v.* Backus, *ibid.* 439; P. P. C. Co. *v.* Pennsylvania, 141 *id.* 18; A. R. T. Co. *v.* Hall, 174 *id.* 70; U. R. T. Co. *v.* Lynch, 177 *id.* 149; A. Ex. Co. *v.* Ohio, 165 *id.* 194, 166 *id.* 185; A. Ex. Co. *v.* Kentucky, 166 *id.* 171; W. U. T. Co. *v.* Massachusetts, 125 *id.* 530; W. U. T. Co. *v.* Taggart, 163 *id.* 1; W. U. T. Co. *v.* Missouri, 190 *id.* 412. But in estimating the value of the whole property the state may not include property in another state which is not used by the company in its business: Fargo *v.* Hart, 193 *id.* 490.

[91] Kelley *v.* Rhoads, 188 U. S. 1.

[92] Hays *v.* P. M. S. S. Co., 17 How. 596; St. Louis *v.* W. F. Co., 11 Wall. 423; Morgan *v.* Parham, 16 *id.* 471; Moran *v.* New Orleans, 112 U. S. 69; G. F. Co. *v.* Pennsylvania, 114 *id.* 196; P. & S. S. S. Co. *v.* Pennsylvania, 122 *id.* 326.

[93] The Passenger Cases, 7 How. 283; Henderson *v.* The Mayor, 92 U. S. 259; Chy Lung *v.* Freeman, *ibid.* 275; People *v.* C. G. T., 107 *id.* 59; P. & S. S. S. Co. *v.* Pennsylvania, 122 *id.* 326, overruling the case of the State Tax on Railway Gross Receipts, 15 Wall. 284.

[94] Almy *v.* California, 24 How. 169.

[95] Steamship Co. *v.* Portwardens, 6 Wall. 31.

state;[96] nor can a state tax the interstate transportation of passengers or goods. It, therefore, cannot tax interstate freight by the pound;[97] nor can it tax the total number of sleeping cars brought into the state by a foreign corporation;[98] nor can it tax the entire gross receipts of corporations engaged in the business of running cars not their own property over a railway line within the state.[99]

[96] W. U. T. Co. *v.* Texas, 105 U. S. 460.

[97] The State Freight Tax, 15 Wall. 232; E. Ry. *v.* Pennsylvania, *ibid.* 282, note.

[98] Pickard *v.* P. S. C. Co., 117 U. S. 34; Tennessee *v.* P. S. C. Co., *ibid.* 51; Allen *v.* P. P. C. Co., 191 *id.* 171.

[99] Fargo *v.* Michigan, 121 U. S. 230.

CHAPTER IV.

THE REGULATION OF COMMERCE.

29. The constitutional provisions.
30. The historical reason for the provisions.
31. Commerce defined.
32. Regulation of commerce defined.
33. The general principles defining the limits of national and state regulation.
34. The internal commerce of a state.
35. Navigable waters and the soil under them.
36. Preferences of ports.
37. Duties upon exports.
38. Duties upon tonnage.
39. Port dues.
40. Pilotage.
41. Regulation of navigation.
42. Port regulations.
43. Quarantine.
44. Ferries.
45. Bridges and dams.
46. Improvements of navigation.
47. Wharves and piers.
48. State duties upon imports and exports.
49. State inspection laws.
50. Taxation discriminating against goods from other states.
51. The original package doctrine.
52. Transportation: (a) State regulation in the exercise of the police power; (b) Regulation by taxation; (c) The Interstate Commerce Act.
53. The Anti-trust law.
54. Telegraphs.
55. Commerce with the Indian tribes.

The constitutional provisions.

29. The Constitution of the United States contains three clauses which directly bear upon the regulation of commerce. Section 8 of Article I declares that "the Congress shall have power . . . to regulate commerce with foreign nations, and among the several states, and with the Indian tribes." Section 9 of the same article enum-

erates among the exceptions from the powers granted to the United States, that "no tax or duty shall be laid on articles exported from any state. No preference shall be given by any regulation of commerce or revenue to the ports of one state over those of another: nor shall vessels bound to, or from, one state, be obliged to enter, clear, or pay duties in another." Section 10 of the same article, in its enumeration of the expressed restrictions upon the powers of the states, declares that "no state shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws: and the net produce of all duties and imposts, laid by any state on imports or exports, shall be for the use of the treasury of the United States; and all such laws shall be subject to the revision and control of the Congress. No state shall, without the consent of Congress, lay any duty of tonnage." The constitutional provisions are, in effect, *first,* a grant to Congress of the power of regulating foreign and interstate commerce, with the expressed restriction that the United States shall not lay any tax or duty on articles exported from any state, nor give preference by any regulation to the ports of one state over those of another, nor oblige vessels bound to or from one state to enter, clear, or pay duties in another; *second,* an implied restraint upon state regulation of foreign or interstate commerce; and *third,* an expressed prohibition of state duties on imports, exports, or tonnage, save under certain defined restrictions, the most material of which is the consent of Congress. These constitutional provisions are not only in full force and vigour to-day, but their application is wider and more far-reaching than the framers of the Constitution imagined to be within the bounds of possibility. The only commerce that they knew was the foreign and coastwise

commerce that was carried in ships. They little thought that the time would ever come when the commerce so carried would be far exceeded in amount and in value by the internal commerce of the country, yet that time has come. In the one hundred and seventeen years that have passed since the adoption of the Constitution, the country has made great strides. Less than three millions of people have grown to be more than seventy millions in number. Discoveries in science and inventions in the arts have developed new subjects of trade, and have created new agencies of commerce. Steam and electricity have been made to do man's bidding. Sailing vessels have given way to steamships, and railways have superseded turnpike roads, Conestoga wagons and canals for the movement of intraterritorial freight. Telegraphs and telephones have annihilated distance. The growth of population, the creation of new subjects of trade, and the improvements in the movement of traffic have necessarily resulted in a vast enlargement in the volume of commerce. In view of these great changes in the conditions of the problem, it is more than ever important that the constitutional limits upon the regulation of commerce should be clearly comprehended, and that the line which separates the provinces of federal and of state authority over this subject of national interest should be, so far as is possible, accurately defined.

The historical reason for the provisions.

30. It is an historical fact that the Constitution was framed and adopted mainly because all of the states had suffered under the Confederation by reason of the selfish commercial policy of England in closing her markets to goods of American manufacture, and because some of the states had also suffered by reason of the no less selfish commercial policy of other states in the imposition of

heavy duties on imported goods, and in the enforcement of vexatious restrictions upon trade. There were great differences of opinion as to other features of the Constitution, yet, in the convention of 1787 and among the people, there was practical unanimity as to the expediency of vesting in the government of the United States the power of so regulating commerce as to overcome the disintegrating forces which threatened the loss of all that had been gained by the success of the Revolution.[1] But if the framers of the Constitution had ever imagined that the power of regulating commerce would be expanded as it has been by judicial construction, no such power would have been vested in Congress.

Commerce defined.

31. The term "commerce," as Marshall, C. J., construed it,[2] means not only traffic, but also commercial intercourse in all its branches, including transportation by sea and on land, importation and exportation, and all that is necessarily incident thereto. As the Constitution is a frame of government intended to endure for all time, it follows that the term "commerce" must receive a construction sufficiently elastic to comprehend not only the subjects and instrumentalities of commerce known and used when the Constitution was framed, but also all present and future subjects of commerce and agencies of commercial intercourse.[3] Yet everything that is connected with commerce is not necessarily commerce. Bills of exchange may be given in payment for goods to be imported, and yet such bills are mere personal obligations,

[1] Gibbons *v.* Ogden, 9 Wheat. 1; Brown *v.* Maryland, 12 *id.* 445; Cook *v.* Pennsylvania, 97 U. S. 566; County of Mobile *v.* Kimball, 102 *id.* 691.

[2] Gibbons *v.* Ogden, 9 Wheat. 1.

[3] P. T. Co. *v.* W. U. T. Co., 96 U. S. 1.

and are not in themselves subjects of commerce.[4] Money assessed for state taxation is not by a subsequent investment in a subject of commerce relieved from such taxation.[5] So, also, a contract of insurance is not "an instrumentality of commerce, but a mere incident of commercial intercourse."[6] A state may, therefore, prohibit foreign insurance companies and their agents from effecting within its territory contracts of insurance, marine, or otherwise, save upon such conditions as the state may prescribe;[7] but a state cannot prohibit its citizens from effecting in another state a contract of insurance.[8] Acts of Congress[9] having authorized the registration in the patent office of devices in the nature of trade-marks, made the wrongful use thereof a cause of action for damages, and punished by fine and imprisonment the fraudulent use, sale, and counterfeiting thereof, it was held[10] that the statutes in question were unconstitutional because not limited in terms, or by the essential nature of their subject-matter, to the regulation of trade-marks in their relation to foreign and interstate commerce. A subsequent statute[11] has provided for the registration and protection of trade-marks used in foreign and interstate commerce, and is not open to the objection which invalidated the prior statutes. On the other hand, bills of lading of goods sold

[4] Bank of Augusta *v.* Earle, 13 Pet. 519, 531; Sturges *v.* Crowninshield, 4 Wheat. 147; Nathan *v.* Louisiana, 8 How. 73.

[5] People *v.* Commissioners, 104 U. S. 466.

[6] Per Gray, J., Nutting *v.* Massachusetts, 183 U. S. 556.

[7] Paul *v.* Virginia, 8 Wall. 168; Ducat *v.* Chicago, 10 *id.* 410; L. I. Co. *v.* Massachusetts, *ibid.* 566; P. F. A. *v.* New York, 119 *id.* 110; Hooper *v.* California, 155 *id.* 648; N. Y. L. I. Co. *v.* Cravens, 178 *id.* 389; Nutting *v.* Massachusetts, 183 *id.* 553.

[8] Allgeyer *v.* Louisiana, 165 U. S. 578.

[9] 14th August, 1876, 19 Stat. 141; 8th July, 1870, Rev. Stat., secs. 4937 to 4947.

[10] The Trade Mark Cases, 100 U. S. 82.

[11] Act of 3d March, 1881, 21 Stat. 502, c. 138. See also Ryder *v.* Holt, 128 U. S. 525; Warner *v.* S. & H. Co., 191 *id.* 195.

and transported in the course of interstate commerce are, by reason of their representative character, entitled to protection as commerce,[12] and the transmission of ideas by telegraph is commerce, for the reason that in the development of modern business methods the telegraph has become indispensable as a means of intercommunication in commercial intercourse.[13] Would not the same reasoning apply, in the case of goods admittedly subjects of commerce, to the trade-marks on such goods, the bills of exchange drawn for the price of the goods, and the policies of insurance against the loss of the goods by fire or by the perils of navigation? Insurance, commercial paper, and trade-marks are certainly as nearly related to, and as truly incidents of, commerce, as a telegraphic inquiry as to the state of the market, or a telegraphic order for the forwarding of the goods, though, unlike the bill of lading, they do not represent the goods. Lottery tickets are subjects of traffic, and the carriage of such tickets by independent carriers from one state to another is interstate commerce.[14] The transfer of shares of railway companies is interstate commerce when such shares are transferred for the purpose of vesting in a holding company a majority of the shares of two competing railways engaged in interstate traffic.[15]

Regulation of commerce defined.

32. To regulate commerce is "to prescribe the rule by which commerce is to be governed."[16] The power to

[12] Almy *v.* California, 24 How. 169; as explained by Miller, J., in Woodruff *v.* Parham, 8 Wall. 138. A tax on foreign bills of lading is a tax on exports: Fairbank *v.* U. S., 181 U. S. 283.

[13] P. T. Co. *v.* W. U. T. Co., 96 U. S. 1, 9; Tel. Co. *v.* Texas, 105 *id.* 460, 464; W. U. T. Co. *v.* James, 162 *id.* 650.

[14] Lottery Case, 188 U. S. 321, 363. Fuller, C. J., and Brewer, Shiras, and Peckham, JJ., dissented.

[15] N. S. Co. *v.* U. S., 193 U. S. 197.

[16] Per Marshall, C. J., Gibbons *v.* Ogden, 9 Wheat. 1, 196.

regulate is unrestrained, and it may, therefore, either control or prohibit. Commerce may be directly regulated by legislation enacted in the exercise of the police power and prescribing the manner in which the operations of commerce are to be conducted, or it may be indirectly regulated by the imposition of taxation upon its instrumentalities or subjects.[17] Taxation has been defined [18] as the compulsory exaction by a government, in the exercise of its sovereignty, of a payment of money or surrender of property by any person, natural or corporate, who, or whose property so taxed, is subject to the sovereign power of that government.[19] The police power may be defined to be that function of government by the exercise of which all persons who are subject to the sovereignty of the government exercising the power are, for reasons of public policy, restrained in their use or enjoyment of some right of person or of property.[20] The police power may attain its end by absolutely prohibiting the exercise of a particular right or by so regulating the exercise of that right as to permit its use under conditions, and, if the power exist, the extent to which it may be exercised in any case is limited only by the legislation of the government in which the power may be vested, unless further restraint be imposed by the Constitution of the United States or by the constitution of the state. Congress cannot, in the exercise of the power to regulate, tax com-

[17] P. & S. S. S. Co. *v.* Pensylvania, 122 U. S. 336, per Bradley, J. "Taxing is one of the forms of regulation. It is one of the principal forms."

[18] *Supra*, sec. 14.

[19] McCulloch *v.* Maryland, 4 Wheat. 420; The State Freight Tax, 15 Wall. 277.

[20] Taney, C. J., said, in the License Cases, 5 How. 504, 583, that the police powers "are nothing more nor less than the powers of government inherent in every sovereignty to the extent of its dominions." Harlan, J., said, in Patterson *v.* Kentucky, 97 U. S. 501: "The police powers extend at least to the protection of the lives, the health, and the property of the community against the injurious exercise by the citizen of his own rights."

merce;[21] and while the states cannot regulate foreign or interstate commerce, they are not prohibited from taxing either its instrumentalities or subjects, provided that taxation be imposed thereon as component parts of the mass of property in the state, and provided also that that which is in form taxation be not in substance a restriction upon, or a prohibition of, foreign or interstate commerce. The essential difference between taxation of property, and regulation of commerce in the guise of taxation, is illustrated by every case in which the court has had to determine whether any particular tax imposed under state authority on an instrumentality or subject of foreign or interstate commerce be, or be not, forbidden by the Constitution.[22] In the exercise of its power over commerce, Congress has, in statutes too numerous to mention, imposed duties on imports and even prohibited importations of certain goods[23] and regulated, among other things, the registration and recording of the titles of ships,[24] the clearance and entry of ships and steamers,[25] the tonnage duties payable to the United States by vessels,[26] navigation, including sailing rules, and the life-saving service,[27] the transportation of passengers and merchandise by sea,[28] the shipping of sailors,[29] and their pay and discharge,[30]

[21] Gibbons *v.* Ogden, 9 Wheat. 201; The Passenger Cases, 7 How. 402, 479.

[22] See particularly T. Co. *v.* Wheeling, 99 U. S. 280; W. F. Co. *v.* St. Louis, 107 *id.* 374; C. & C. B. Co. *v.* Kentucky, 154 *id.* 204, 212.

[23] Buttfield *v.* Stranahan, 192 U. S. 470.

[24] 29 Stat. 188 c. 255.

[25] Rev. Stat. 4197 *et seq.*

[26] Rev. Stat. 4219; 24 Stat. 79, c. 421.

[27] Rev. Stat. 4233; 26 Stat. 320, c. 802; 26 Stat. 425, c. 875; 27 Stat. 557, c. 202; 28 Stat. 82, c. 83; 28 Stat. 281, c. 284; 28 Stat. 645, c. 64; 28 Stat. 672, c. 102; 29 Stat. 381, c. 401; 29 Stat. 689, c. 389; 30 Stat. 96, c. 4.

[28] Rev. Stat. 4252, 4463; 22 Stat. 186, c. 374; 27 Stat. 445, c. 105; 29 Stat. 122, c. 199; 31 Stat. 799, c. 386.

[29] Rev. Stat. 4501, 4509; 28 Stat. 667, c. 97; 29 Stat. 691, c. 389; 30 Stat. 775, c. 28.

[30] Rev. Stat. 4549; 30 Stat. 755, c. 28.

the lighthouse service,[31] the coast survey,[32] the building and use of bridges,[33] the improvement of rivers and harbours,[34] and telegraphs.[35] It has authorized the transportation of government supplies, and mails, and troops by railway, and the connection of railways of different states so as to form a continuous line;[36] it has permitted the states to regulate the storage and sale of original packages of intoxicating liquors;[37] it has regulated the interstate transportation of live stock;[38] it has provided for arbitration between interstate railroad companies and their employees;[39] it has required the use of automatic couplers on interstate trains;[40] it has, by the Interstate Commerce Act and its amendments,[41] regulated the interstate transportation of passengers and freight by railways and constituted a commission to carry the statute into effect; and it has prohibited the making of contracts in restraint of interstate commerce.[42] The states have facilitated foreign and interstate commerce by the improvement of navigation, the construction of railways, wharves, and bridges, and they have incidentally affected it by the enactment of pilotage, quar-

[31] Rev. Stat. 4653.

[32] Rev. Stat. 4681.

[33] 27 Stat. 110, c. 158; 28 Stat. 362, c. 299; 30 Stat. 1151, c. 425.

[34] Rev. Stat. 5244; 26 Stat. 426, 453, 454, c. 907; 27 Stat. 110, c. 158; 30 Stat. 1151 c. 425.

[35] Rev. Stat. 5623; 25 Stat. 382, c. 772.

[36] Rev. Stat. 5285; 25 Stat. 382, c. 772.

[37] 26 Stat. 313, c. 728.

[38] Rev. Stat. 4386 *et seq.;* 23 Stat. 31, 32, c. 60.

[39] 30 Stat. 424, c. 370.

[40] 27 Stat. 531, c. 196.

[41] 24 Stat. 379, c. 104; 25 Stat. 855, c. 382; 26 Stat. 743, c. 128; 27 Stat. 443.

[42] 26 Stat. 209, c. 647. See also U. S. *v.* T. M. F. A., 166 U. S. 290; U. S. *v.* J. T. A., 171 *id.* 505; U. S. *v.* E. C. Knight Co., 156 *id.* 1; Hopkins *v.* U. S., 171 *id.* 578; A. P. & S. Co. *v.* U. S., 175 *id.* 211; N. S. Co. *v.* U. S., 193 *id.* 197.

antine, and police laws. The states have also regulated their internal commerce by taxation and by police legislation.

The general principles defining the limits of national and state regulation.

33. Foreign commerce is, obviously, that which is carried on between a foreign port, or a point in a foreign country, and a port of, or a point in, the United States; interstate commerce is that which is carried on between ports, or points, in different states; and certainly that commerce which begins, moves, and ends, exclusively within a state must be regarded as internal commerce and as such subject to state taxation and regulation. Where commerce begins within a state, passes beyond the territory of that state and through part of another state, and ends in the state of its origin, it is regarded as sufficiently internal commerce to be subject to taxation in the state of its origin and destination "in respect of receipts for the proportion of the transportation within the state." [43] On the other hand, transportation under such conditions is subject only to the regulation of the United States and not to the regulation of the state.[44] It has also been held that navigation on the high seas between ports of the same state is subject to regulation by the United States.[45] A commodity is not to be regarded as a subject of foreign or interstate commerce until it has begun to move in trade from one country or state to another,[46] for, until the commodity is actually shipped or started, "its exportation is a matter altogether *in fieri,* and not at all a fixed and

[43] L. V. R. *v.* Penna.,145 U. S. 192.
[44] Hanley *v.* K. C. S. Ry., 187 U. S. 617.
[45] Lord *v.* S. S. Co., 102 U. S. 541.
[46] The Daniel Ball, 10 Wall. 557.

certain thing."[47] The general distinction as to the respective powers of the United States and the states over commerce was clearly put by Marshall, C. J.,[48] when he said, "The genius and character of the whole government seems to be that its action is to be applied to all the external concerns of the nation, and to those internal concerns which affect the states generally, but not to those which are completely within a particular state, which do not affect other states, and with which it is not necessary to interfere for the purpose of executing some of the general powers of the government." Therefore, the internal commerce of a state is exclusively a subject of regulation by that state; and foreign and interstate commerce are subjects of regulation by Congress. But, as Curtis, J., said, the power to regulate foreign and interstate "commerce embraces a vast field, containing not only many, but exceedingly various, subjects, quite unlike in their nature; some imperatively demanding a single uniform rule, operating equally on the commerce of the United States in every port, and some . . . as imperatively demanding that diversity which alone can meet the local necessities."[49] Therefore, where the subject is national in its character and demands uniformity of regulation, Congress alone can legislate, and, when Congress has not legislated, it necessarily follows that that subject is to be free from all legislation whatever. The so-called "doctrine of the silence of Congress" means this, and nothing more than this.[50] On the other hand, where the subject is not

[47] Coe *v.* Errol, 116 U. S. 528; per Bradley, J.

[48] Gibbons *v.* Ogden, 9 Wheat. 294.

[49] Cooley *v.* Board of Wardens, 12 How. 299, 314.

[50] Welton *v.* Missouri, 91 U. S. 275; County of Mobile *v.* Kimball, 102 *id.* 691; Brown *v.* Houston, 114 *id.* 681; Robbins *v.* Shelby County Taxing District, 120 *id.* 493; Bowman *v.* C. & N. W. Ry., 125 *id.* 465, 508; Leisy *v.* Hardin, 135 *id.* 100. Compare the ingenious argument of Dr. Wm.

national in its character, and where local necessities require diversity of regulation, the states may legislate, and their legislation will be controlling and effective until, and only until, congressional legislation shall supersede the state legislation.[51]

The internal commerce of a state.

34. As Chase, C. J., said,[52] referring to the internal commerce of a state, "Over this commerce and trade Congress has no power of regulation nor any direct control. This power belongs exclusively to the states." The United States, therefore, may not prohibit the sale within the territory of a state of illuminating oil inflammable at less than a specified temperature;[53] nor license the sale of liquor in violation of the laws of the state;[54] nor does a license granted by the United States exempt the licensee from state taxation on the business so conducted;[55] nor do letters patent granted for an invention confer upon the patentee the right of selling the patented article in violation of the laws of the state.[56] The cases which illustrate the power of the state over its internal commerce are hereinafter referred to, and the rule deducible from them is that, while each state did not, by the adoption of the Constitution, surrender its ordinary local powers of self-government operative upon all persons and property which exist, or may come, within its territory, and which merge in the mass of persons and property subject to its

Draper Lewis, in Chapter VI of his "Federal Power over Commerce and its Effect on State Action."

[51] C. & C. B. Co. *v.* Kentucky, 154 U. S. 204. See particularly the judgment of Brown, J., pp. 209 to 213, where there is a full discussion of this subject, and an exhaustive classification of the cases.

[52] License Tax Cases, 5 Wall. 462, 470.

[53] U. S. *v.* Dewitt, 9 Wall. 41; *cf.* Felsenheld *v.* U. S., 186 U. S. 126.

[54] McGuire *v.* The Commonwealth, 3 Wall. 387.

[55] Pervear *v.* The Commonwealth, 5 Wall. 475.

[56] Patterson *v.* Kentucky, 97 U. S. 501.

jurisdiction, yet, nevertheless, the territorial limits of each state's jurisdiction, the grant to the government of the United States of powers conflicting with state sovereignty, and a due regard to the rights of citizens of other states, must be held to limit the exercise by each state of its otherwise illimitable powers, by the restriction that those powers are not to be so exercised as to interfere with the full execution of the powers granted to the United States. Therefore, persons or property brought within the territory of a state by the exercise of any federal power, must be exempted from obstructive state control until the federal power has ceased to operate, and until the persons or property on which it acted have merged in the mass of persons or property within the territory of the state.[57] On the same principle, federal agencies are exempted from any such state regulation as hinders the agent in the full performance of his or its duty to the government of the United States.

Navigable waters and the soil under them.

35. Before the Revolution, the title to navigable waters and to the soil under them was vested in the crown, or in its grantees. After the Revolution, the people became sovereign, and thenceforth the title to navigable waters within the jurisdiction of a riparian state and to the soil under them became vested in that state for the public use of its citizens.[58] After the adoption of the Constitution,

[57] A herd of sheep, driven at a reasonable rate of speed from a point in one state a distance of many hundred miles across the territory of a second state to a point in a third state and fed by grazing *en route,* is property engaged in interstate commerce, and, as such, exempt from taxation in the second state: Kelley *v.* Rhoads, 188 U. S. 1.

[58] Martin *v.* Waddell, 16 Pet. 367; Rundle *v.* D. & R. C. Co., 14 How. 80; Den *v.* Jersey Co., 15 *id.* 426; Smith *v.* Maryland, 18 *id.* 71; Jones *v.* Soulard, 24 *id.* 41; R. Co. *v.* Schurmeir, 7 Wall. 272; Weber *v.* Harbor Commissioners, 18 Wall. 57; I. C. R. *v.* Illinois, 146 U. S. 387, 184 *id.* 77; St. A. F. W. P. Co. *v.* St. P. W. Comrs., 168 *id.* 349.

as before, the title to navigable waters and to the soil under them and the right to fish therein remained in the riparian state, its proprietary title extending in the case of inland waters constituting its boundary [59] from ordinary high-water mark *ad medium filæ,* and in the case of the sea and its bays, to the distance that the international jurisdiction of the United States extended; and by force of the Constitution, the United States acquired only the right to exercise over navigable waters its power of regulating navigation, and states which were admitted to the union subsequently to the adoption of the Constitution have, of course, in this respect the same rights of sovereignty and jurisdiction as the original thirteen states.[60] Therefore, a state may rightfully regulate the exercise of the right of fishing in its navigable waters, and enforce by judicial proceedings a forfeiture of vessels whose navigators fail to conform to the regulations so prescribed, and a license to navigate granted by the United States confers no immunity from the operation of such regulations.[61] The right of the people of a state to fish in its navigable waters "comes not from their citizenship alone, but from their citizenship and property combined," [62] and it is, therefore, a right which does not by force of the Constitution vest in the citizens of other states. The power granted to the United States of jurisdiction in admiralty does not carry with it a cession of navigable waters, or of general jurisdiction over them, and, therefore, a murder committed on a vessel of the navy of the United States while at anchor

[59] Barney *v.* Keokuk, 94 U. S. 324; Hardin *v.* Jordan, 140 *id.* 371; Mitchell *v.* Smale, *ibid.* 406.

[60] Pollard *v.* Hagan, 3 How. 212; Weber *v.* Harbor Commissioners, 18 Wall. 57; Shively *v.* Bowlby, 152 U. S. 1; M. T. Co. *v.* Mobile, 187 *id.* 479; U. S. *v.* M. R. Co., 189 *id.* 391.

[61] Smith *v.* Maryland, 18 How. 71; Manchester *v.* Massachusetts, 139 U. S. 240; *cf.* Geer *v.* Connecticut, 161 *id.* 519.

[62] McCready *v.* Virginia, 94 U. S. 391, 395.

in navigable waters within the jurisdiction of a state is not cognizable in a court of the United States.[63]

Preferences of ports.

36. The Constitution declares that "no preference shall be given by any regulation of commerce or revenue to the ports of one state over those of another."[64] This prohibition is obviously intended to guard against favouritism in customs regulations, and, therefore, does not apply to the diversion of water from one navigable river to another in an improvement of navigation,[65] nor to the legalization by an act of Congress of a bridge over navigable waters, though indirectly obstructing the commerce of a port.[66]

Duties upon exports.

37. The United States are expressly forbidden to tax exports.[67] This prohibition applies to foreign, and does not apply to interstate, commerce,[68] nor to goods "imported from the United States" into Porto Rico.[69] Internal revenue stamps required to be placed by the manufacturer upon articles for exportation do not fall within the prohibition.[70] On the other hand, a specific stamp

[63] U. S. *v.* Bevans, 3 Wheat. 336.

[64] Article I, Sec. 9.

[65] South Carolina *v.* Georgia, 93 U. S. 4.

[66] Pennsylvania *v.* W. & B. B. Co., 18 How. 421, 423.

[67] Const., Article I, Sec. 9.

[68] Woodruff *v.* Parham, 8 Wall. 123.

[69] Act of 12th April, 1900, 31 Stat. 77, c. 191, secs. 2 and 3; Dooley *v.* U. S., 183 U. S. 151. White, J., held that the fact that Porto Rico is not a foreign country is decisive. Brown, Gray, Shiras, and McKenna, JJ., concurred, holding, also, that the tax was imposed upon importations into Porto Rico, and not upon exports from the United States. Fuller, C. J., and Harlan, Brewer, and Peckham, JJ., dissented upon the ground that the prohibition forbids duties upon exports "irrespective of their destination." See *supra*, sec. 17.

[70] Pace *v.* Burgess, 92 U. S. 372; Turpin *v.* Burgess, 117 *id.* 504; Cornell *v.* Coyne, 192 *id.* 418.

duty imposed upon bills of lading covering goods exported is a tax upon the articles covered by the bill of lading, and, therefore, a tax upon exports.[71]

Duties upon tonnage.

38. The Constitution in express terms forbids the states to impose duties on tonnage. Section 10 of Article I of the Constitution declares that "no state shall, without the consent of Congress, lay any duty on tonnage." The word "tonnage," as applied to American shipping, means "their entire internal capacity, expressed in tons of one hundred cubical feet each, as estimated and ascertained by those rules of admeasurement and computation[72] which are prescribed by the acts of Congress.[73] The constitutional prohibition prevents state taxation of "water-crafts plying in the navigable waters of the state . . . at the rate of $1 per ton of registered tonnage."[74] Nor can a state require that every vessel arriving at a port of the state shall pay to the port wardens a fixed sum whether the wardens be, or be not, called on to perform any services for the vessel;[75] nor compel every vessel arriving at any quarantine station on the coast of the state to pay a fixed sum per ton;[76] nor require every steamboat mooring in any port of the state to pay a sum regulated by the tonnage of the boat;[77] nor require all vessels entering a certain port to load or unload, or making fast to any wharf therein, to pay a sum regulated by the registered tonnage

[71] Fairbank *v.* U. S., 181 U. S. 283. Harlan, Gray, White, and McKenna, JJ., dissented.

[72] State Tonnage Tax Cases, 12 Wall. 204.

[73] 13 Stat. 70; *ibid.* 444.

[74] State Tonnage Tax Cases, 12 Wall. 204.

[75] Steamship Co. *v.* Port Wardens, 6 Wall. 31.

[76] Peete *v.* Morgan, 19 Wall. 581.

[77] Cannon *v.* New Orleans, 20 Wall. 577.

of the vessel.[78] In each one of these cases, the taxation imposed by the state would have been void as an attempted regulation of interstate commerce, had there been no express prohibition of state tonnage duties.

Port dues.

39. Port dues, that is, charges imposed on vessels as instruments of commerce, and payable by all vessels entering, remaining in, or leaving a port, by reason of such entry, stay, or departure, and without regard to services rendered to or received by the vessel, are regulations of commerce, and as such cannot be rightfully imposed under state authority.[79] Under this rule, as expounded in Steamship Co. *v.* Port Wardens,[80] a charge of $5 per vessel payable to the wardens "whether called on to perform any service or not, for every vessel arriving in" the port of New Orleans, was held to be a wrongful imposition. So also, under pretence of making port regulations, a state cannot rightfully vest in the master and wardens of a port, or in his deputies, a monopoly of the survey of the hatches of sea-going vessels coming to the port, or of damaged goods on such vessels, for such a monopoly is a burden upon, and therefore a regulation of, foreign and interstate commerce.[81] The prohibition of state duties on tonnage[82] forbids the imposition by a state of port dues in the form of a tax of $5 for the first hundred tons and 1 1-2 cents for each additional ton payable by vessels owned in another state and entering a harbour of the taxing state in the pursuit of commerce,[83] and also of a tax similarly propor-

[78] I. S. S. Co. *v.* Tinker, 94 U. S. 238.

[79] Such dues are also open to objection as duties on tonnage. Section 36.

[80] 6 Wall. 31.

[81] Foster *v.* Master and Wardens of the Port of New Orleans, 94 U. S. 246.

[82] Section 38.

[83] Peete *v.* Morgan, 19 Wall. 581.

tioned on "all steamboats which shall moor or land in any part of" a state port.[84]

Pilotage.

40. As the thirteen original states were, before the ratification of the Constitution, existing governments, they had, with the obvious exception of New Hampshire, enacted laws regulating pilotage. The first Congress[85] declared that "all pilots . . . shall continue to be regulated in conformity with the existing laws of the states respectively wherein such pilots may be, or with such laws as the states may respectively hereafter enact for the purpose, until further legislative provision shall be made by Congress." It has been held that, pilotage being a subject of local concern, the states may regulate it so long as, and to the extent that, Congress does not legislate with regard to it.[86] A state may impose upon a vessel refusing to take an offered pilot the forfeiture of half pilotage fees, and it may exempt from such forfeiture vessels engaged in a particular trade.[87] The forfeiture of half pilotage fees being, not in the nature of a penalty, but of compensation under an implied contract,[88] those fees must be paid though the pilot's services were tendered and refused before the vessel had come within the jurisdiction of the state,[89] and though the statute authorizing the recovery was repealed after the services of the pilot were tendered and refused, but before the action was brought to recover therefor.[90] Such

[84] Cannon *v.* New Orleans, 20 Wall. 577.
[85] Act 7th August, 1789, sec. 4, 1 Stat. 54.
[86] Cooley *v.* The Board of Wardens, 12 How. 299.
[87] *Ex parte* McNiel, 13 Wall. 236; Wilson *v.* McNamee, 102 U. S. 572.
[88] *Ex parte* McNiel, *supra.*
[89] Wilson *v.* McNamee, *supra.*
[90] S. S. Co. *v.* Joliffe, 2 Wall. 450.

a statute may impose a compulsory obligation on foreign vessels.[91] But a state may not discriminate in its pilotage regulations, as by requiring vessels of some states to pay half pilotage fees and exempting vessels of other states from that requirement; nor can a vessel under the control of a pilot licensed under the laws of the United States be required to take a pilot under the laws of a state.[92]

Regulation of navigation.

41. The power to regulate foreign and interstate commerce includes the control of navigation in the prosecution of such commerce. The United States may, therefore, license vessels navigating waters within the territorial jurisdiction of a state and plying between ports of different states, and a state may not create a monopoly interfering with the freedom of such navigation.[93] The United States may require, under a penalty, the inspection and licensing of a steam vessel[94] engaged in the transportation on a state's internal waters of goods from, or destined to, points in other states.[95] A state may not require vessels licensed by the United States to carry on the coasting trade and plying between a port in that state and ports in other states,[96] or vessels also licensed by the United States and employed as lighters and towboats in a port of a state in aid of vessels engaged in commerce, either foreign or coastwise,[97] to make return to the local authorities of the names, places of residence, and re-

[91] The China, 7 Wall. 53.
[92] Spraigue *v.* Thompson, 118 U. S. 90.
[93] Gibbons *v.* Ogden, 9 Wheat. 1.
[94] Acts 7th July, 1838, 5 Stat. 304; 30th August, 1852, 10 Stat. 61.
[95] The Daniel Ball, 10 Wall. 557.
[96] Sinnot *v.* Davenport, 22 How. 227.
[97] Foster *v.* Davenport, 22 How. 244.

spective interests of the owners of such vessels.[98] A state may not require "those engaged in the transportation of passengers among the states to give to all persons traveling within that state, upon vessels employed in such business, equal rights and privileges in all parts of the vessel without distinction on account of race or colour," for such a statute acts directly upon the business, as it comes into the state from without, or goes out from within.[99] On the other hand, a state may grant an exclusive monopoly of the navigation of an internal waterway which, by reason of a lack of outlet or other connection with any possible system of interstate or foreign transportation, is available only for the internal commerce of the state, and on such a waterway an United States coasting enrollment and license is inoperative.[100]

Port regulations.

42. A state may establish port regulations, prescribing where a vessel may lie in harbour, how long she may remain there, and what lights she must show at night; thus in The James Gray *v.* The John Fraser,[1] an admiralty cause of damage resulting from a collision of the two vessels in Charleston harbour, that one was held to be in fault, which had, by its failure to display lights in conformity with the regulations of the port imposed under authority of the state, been the cause of the collision. Taney, C. J., said,[2] "Regulations of this kind are necessary and indispensable in every commercial port, for the convenience and safety of commerce, and the local au-

[98] The case of New York *v.* Miln, 11 Pet. 102, though cited, and relied on, in the argument, was not noticed in the judgment of the court.

[99] Hall *v.* De Cuir, 95 U. S. 485; *cf.* L., N. O. & T. Ry. *v.* Mississippi, 133 *id.* 587; C. & O. Ry. *v.* Kentucky, 179 *id.* 388.

[100] Veazie *v.* Moor, 14 How. 568.

[1] 21 How. 184.

[2] P. 187.

thorities have a right to prescribe at what wharf a vessel may lie, and how long she may remain there, where she may unload or take on board particular cargoes, where she may anchor in the harbour, and for what time, and what description of light she shall display at night to warn the passing vessels of her position, and that she is at anchor and not under sail. They are like to the local usages of navigation in different ports, and every vessel, from whatever part of the world she may come, is bound to take notice of them and conform to them. And there is nothing in the regulations referred to in the port of Charleston, which is in conflict with any law of Congress regulating commerce, or with the general admiralty jurisdiction conferred on the courts of the United States.'' Ostensibly on the same principle, it was held in New York *v.* Miln,[3] that a state may require under a penalty the master of every passenger-carrying vessel on arriving at any port within the state to report to the state authorities the name, place of birth, last legal settlement, age, and occupation of every passenger, the statute under consideration being one enacted by New York in 1824, and the court affirming its validity on the ground that it was a regulation, not of commerce, but of police, and as such falling within the reserved powers of the state. The authority of the case is, however, much shaken by the admirably reasoned dissenting judgment of Story, J., with whose conclusions Marshall, C. J., concurred,[4] and the result reached by the court is clearly inconsistent with the later cases of Sinnot *v.* Davenport,[5] Foster *v.* Davenport,[6] and the yet later cases, which hold that a state cannot, directly or

[3] 11 Pet. 102.
[4] P. 161.
[5] 22 How. 227.
[6] 22 How. 224; *supra,* Section 41.

indirectly, tax the transportation of passengers coming from foreign countries.[7]

Quarantine.

43. As Brown, J., said in Bartlett *v.* Lockwood,[8] "While, under its power to regulate foreign and interstate commerce, the authority of Congress to establish quarantine regulations, and to protect the country as respects its commerce from contagious and infectious diseases, has never in recent years been questioned, such power has been allowed to remain in abeyance; and Congress, doubtless in view of the different requirements of different climates and localities, and of the difficulty of framing a general law upon the subject, has elected to permit the several states to regulate the matter of protecting the public health as to themselves seemed best." A state may, therefore, prohibit the entry into its territory of physically infected persons or goods, and it may provide for an examination of all persons or goods coming into its territory in order to determine whether or not they be physically infected, and to defray the expenses of such sanitary examinations it may collect charges, provided that such charges be not in the form of duties on tonnage and that they do not unnecessarily interfere with foreign or interstate commerce. A state may, therefore, require all vessels coming into its ports to stop at designated quarantine stations, submit to a sanitary examination, and pay therefor fees rated in amount in proportion to the maritime class to which the vessel may belong and equal in amount for all vessels of the same class.[9] On the other hand, a state cannot, for the purpose of defraying the expenses of enforcing her

[7] *Infra,* Section 52*b*.

[8] 160 U. S. 357, 361.

[9] Morgan *v.* Louisiana, 118 U. S. 455; Bartlett *v.* Lockwood, 160 *id.* 357. See also C. F. D. N. *v.* Louisiana, 186 *id.* 380.

quarantine regulations, impose on vessels entering her harbours in the prosecution of commerce, taxes based upon the tonnage of the vessel.[10] A state may enact statutes declaring that persons transporting, or having in their possession, diseased animals are to be held liable for any damage caused by the spread of disease by such animals,[11] and a state may authorize its sanitary authorities to exclude from its territory animals imported from localities in other states wherein those sanitary authorities may determine epidemic diseases among such animals to exist;[12] but a state may not, under the pretext of quarantine laws, regulate interstate commerce, as by prohibiting the driving or conveyance of Texan, Mexican, and Indian cattle into the state between the 1st of March and the 1st of November in any year,[13] or by prohibiting the sale of meat which has not been inspected on the hoof within the state.[14] The test is, as stated by McKenna, J., "whether the police power of the state has been exercised beyond its province, exerted to regulate interstate commerce, exerted to exclude without discrimination the good and the bad, the healthy and the diseased, and to an extent beyond what is necessary for any proper quarantine. . . . The prevention of disease is the essence of a quarantine law. Such a law is directed not only to the actually diseased, but to what has become exposed to disease."[15]

Ferries.

44. A ferry is "a franchise grantable by the state, to be exercised within such limits and under such regulations as

[10] Peete *v.* Morgan, 19 Wall. 581.

[11] Kimmish *v.* Ball, 129 U. S. 217; M., K. & T. Ry. *v.* Haber, 169 *id.* 613.

[12] Rasmussen *v.* Idaho, 181 U. S. 198; Smith *v.* S. L. & S. W. R., *ibid.* 248. See also Reid *v.* Colorado, 187 *id.* 137.

[13] R. Co. *v.* Husen, 95 U. S. 465.

[14] Minnesota *v.* Barber, 136 U. S. 313.

[15] Smith *v.* S. L. & S. W. Ry., 181 U. S. 248, 255.

may be required for the safety, comfort, and convenience of the public,'' [16] and such a franchise confers the right of embarking and landing passengers and freight at designated points on a water bank.[17] Such a franchise is necessarily exclusive.[18] The state which grants the franchise may annex conditions to its exercise, and may, therefore, tax the ferry and its appliances. It may also tax the boats and other personal property of the owner of the ferry, if that owner be by residence subject to its jurisdiction.[19] On the other hand, a state cannot tax ferry boats which only come within its jurisdiction in the movement of interstate commerce.[20]

Bridges and dams.

45. Navigability in fact is the test of navigability in law. If a lake, river, or stream ''be capable in its natural state of being used for purposes of commerce, no matter in what mode the commerce be conducted, it is navigable in fact, and becomes in law a public river or highway.'' [21] As navigable waters are no longer the sole, nor, indeed, the main channels of commerce, and as that volume of trade which is carried over such waters by bridges or viaducts is in many cases entitled, by reason of its magnitude, to greater consideration than that which is moved in boats upon the water, it must be determined in the case of any bridge, or other obstruction, whose erection or the method of whose construction is called into question, whether or

[16] G. F. Co. *v.* Pennsylvania, 114 U. S. 196, per Field, J.

[17] ''A ferry is in respect of the landing place, and not of the water:'' Vin. Abr. Vol. XIII, P. 208, Title ''Ferry.''

[18] Fanning *v.* Gregoire, 16 How. 524; Conway *v.* Taylor, 1 Bl. 603.

[19] W. F. Co. *v.* East St. Louis, 107 U. S. 365; T. Co. *v.* Wheeling, 99 *id.* 273.

[20] St. Louis *v.* W. F. Co., 11 Wall. 423; G. F. Co. *v.* Pennsylvania, 114 U. S. 196. See also St. Clair County *v.* I. S. & C. T. Co., 192 *id.* 454.

[21] The Montello, 20 Wall. 430, 441; Leovy *v.* U. S., 177 U. S. 621; The Daniel Ball, 10 Wall. 557.

not the public interest will be promoted by its erection or by its construction in the particular manner, and such a matter is primarily one for the decision of the legislature, rather than of any court. As the subject is that of possible obstruction of highways of foreign or interstate commerce, final jurisdiction is necessarily vested in Congress,[22] which may forbid, or permit upon conditions, the erection of a bridge under state authority,[23] or may legalize a bridge already erected, pending a suit to enjoin its construction,[24] or even after the Supreme Court of the United States has entered a final decree declaring the bridge as constructed to be an unlawful obstruction;[25] or may reserve for future congressional action the approval of the construction of any bridge under an act of the legislature of any state over or in any "stream or other navigable water not wholly within the limits of such state," and may delegate to the Secretary of War the power of approving bridges and other obstructions in navigable waters wholly within the limits of any one state, and may prohibit all obstructions not so approved.[26] This congressional legislation does not deprive the states of authority to bridge or otherwise obstruct intraterritorial streams, but only creates "an additional and cumulative remedy to prevent such structure although lawfully authorized, from interfering with commerce,"[27] nor does it vest in the Secretary of War "the right to determine when and where a bridge may be built."[28] Therefore, subject to the

[22] N. B. Co. *v.* U. S., 105 U. S. 470; U. S. *v.* B. B. B. Co., 176 *id.* 211.

[23] N. B. Co. *v.* U. S., 105 U. S. 470.

[24] The Clinton Bridge, 10 Wall. 454.

[25] Pennsylvania *v.* W. & B. B. Co., 18 How. 421.

[26] Act of 13th July, 1892, c. 158, 27 Stat. 88, 110.

[27] Per White, J., in L. S. & M. S. Ry. *v.* Ohio, 165 U. S. 365, 369.

[28] *Ibid.* 368. See also Cummings *v.* Chicago, 188 U. S. 410; Montgomery *v.* Portland, 190 *id.* 89, which decide that under existing legislation the right to construct a wharf or dock in a navigable water of the United

paramount authority of the United States, as exercised by Congress, or, under the legislation now in force, as delegated to the Secretary of War, a state may partially obstruct by bridges, or wholly obstruct by dams, navigable waters which are wholly within its limits.[29] The power of bridging their navigable waters is not affected in the states carved out of the Northwest Territory by the provision in the ordinance of 1787 for the free navigation of the Mississippi and the St. Lawrence "without any tax, duty, or impost therefor,"[30] nor in the states of California, Louisiana, or Oregon by the provisions of the acts of Congress admitting them to the union and declaring their navigable waters to be forever free.[31] A state cannot lawfully appropriate water for its non-navigable streams to such an extent as to impair the navigation of its navigable streams.[32] In the case of the bridge spanning the Ohio river and connecting the city of Cincinnati, in the state of Ohio, with the town of Covington, in the state of Kentucky, it was held by the majority of the court[33] that the

States wholly within the limits of a state depends upon the consent of the state in addition to the consent of the federal government.

[29] Willson *v.* The B. B. C. M. Co., 2 Pet. 245; Pennsylvania *v.* The W. & B. B. Co., 9 How 647, 11 *id.* 528, 13 *id.* 518, 18 *id.* 421; M. & M. R. *v.* Ward, 2 Bl. 485; The Albany Bridge Case, 2 Wall. 403; The Passaic Bridge Case, 3 Wall. 782; Gilman *v.* Philadelphia, *ibid.* 713; Pound *v.* Turck, 95 U. S. 459; Escanaba Co. *v.* Chicago, 107 *id.* 678; Cardwell *v.* A. B. Co., 113 *id.* 205; Hamilton *v.* V., S. & P. R., 119 *id.* 280; Huse *v.* Glover, *ibid.* 543; W. B. Co. *v.* Hatch, 125 *id.* 1; L. S. & M. S. R. *v.* Ohio, 165 *id.* 365; U. S. *v.* B. B. B. Co., 176 *id.* 211; Rider *v.* U. S., 178 *id.* 251; Leovy *v.* U. S., 177 *id.* 621.

[30] Escanaba Co. *v.* Chicago, 107 U. S. 678; Huse *v.* Glover, 119 *id.* 543; Sands *v.* M. R. I. Co., 123 *id.* 288.

[31] Cardwell *v.* A. B. Co., 113 U. S. 205; Hamilton *v.* V., S. & P. R., 119 *id.* 280; W. B. Co. *v.* Hatch, 125 *id.* 1.

[32] U. S. *v.* R. G. D. & I. Co., 174 U. S. 690.

[33] C. & C. B. Co. *v.* Kentucky, 154 U. S. 204; Brown, Harlan, Brewer, Shiras, and Jackson, JJ., concurring in the judgment and also in the opinion, and Fuller, C. J., and Field, Gray, and White, JJ., concurring in the judgment but not in the opinion.

traffic across the river was interstate commerce, that the bridge was an instrument of that commerce, and that Congress possesses the power to fix the charges for the traffic over the bridge, the authority of the state being limited to fixing tolls exclusively within its territory; but the minority of the court held that, as Congress had made no provisions as to the tolls, it had thereby manifested its intention that the rates of toll should be as established by the two states. It has also been held that a state may tax so much of an interstate bridge as is within its territory,[34] and that a state may tax the capital stock of an interstate bridge company incorporated by it.[35]

Improvements of navigation.

46. The United States may, in the discretion of Congress, authorize or prohibit improvements in the waterways of foreign or interstate commerce. It may change the established channels of rivers,[36] and dredge harbours,[37] and the action of the United States is exclusive of any right to the contrary asserted under state authority. On the other hand, a state may exercise exclusive control over such waterways as are wholly within its territory, and are not used in the movement of foreign or interstate commerce.[38] The principle controlling the cases on this subject is nowhere more clearly stated than by Field, J., who said, in County of Mobile *v.* Kimball,[39] "The uniformity of commercial regulations, which the grant to Congress was designed to secure against conflicting state provisions, was necessarily intended only for cases where such uniformity

[34] P., C., C. & S. L. Ry. *v.* Board of Public Works, 172 U. S. 32.
[35] K. & H. B. Co. *v.* Illinois, 175 U. S. 626.
[36] South Carolina *v.* Georgia, 93 U. S. 4.
[37] Wisconsin *v.* Duluth, 96 U. S. 379.
[38] Veazie *v.* Moor, 14 How. 568; Withers *v.* Buckley, 20 *id.* 84.
[39] 102 U. S. 691, 698.

is practicable. Where from the nature of the subject or the sphere of its operations the case is local and limited, special regulations adapted to the immediate locality could only have been contemplated. State action upon such subjects can constitute no interference with the commercial power of Congress, for when that acts the state authority is superseded. Inaction of Congress upon these subjects of a local nature or operation, unlike its inaction upon matters affecting all the states and requiring uniformity of regulation, is not to be taken as a declaration that nothing shall be done with respect to them, but it is rather to be deemed a declaration that for the time being, and until it sees fit to act, they may be regulated by state authority. The improvement of harbours, bays, and navigable rivers within the states falls within this last category of cases. The control of Congress over them is to insure freedom in their navigation, so far as that is essential to the exercise of its commercial power. Such freedom is not encroached upon by the removal of obstructions to their navigability or by other legitimate improvements. The states have as full control over their purely internal commerce as Congress has over commerce among the several states and with foreign nations; and to promote the growth of that internal commerce and insure its safety they have an undoubted right to remove obstructions from their harbours and rivers, deepen their channels, and improve them generally, if they do not impair their free navigation as permitted under the laws of the United States, or defeat any system for the improvement of their navigation provided by the general government." A state may, therefore, if Congress does not otherwise direct, deepen and widen the harbours on its coast,[40] construct dams and locks in navigable rivers, and levy tolls

[40] County of Mobile *v.* Kimball, 102 U. S. 691.

upon shipping using the improved waterway,[41] but a state may not levy charges for an improved waterway upon vessels whose draught is so light that the improvement has been of no benefit to such vessels.[42]

Wharves and piers.

47. A state may build wharves on navigable waters and collect reasonable tolls for the use thereof,[43] for such tolls, not being impositions by virtue of sovereignty, are not taxes but are charges for services rendered or for conveniences provided, and they are claimed in right of proprietorship. Whether wharfage tolls be, or be not, in fact reasonable is not a question of federal law, nor as such cognizable in a court of the United States in cases other than those in which the federal court has acquired jurisdiction by reason of the citizenship of the parties.[44] Nevertheless, the right of a state to build wharves and charge tolls therefor cannot be so exercised as to discriminate in favour of the products of its own territory and against those of other states.[45]

State duties upon imports and exports.

48. "Imports" are goods brought into a state from a foreign country, and goods brought from one state into another are not "imports."[46] As the power vested in the United States to regulate commerce with foreign nations includes the power to impose duties on the importation of foreign goods, and to license, on the payment

[41] Huse *v.* Glover, 119 U. S. 543; Sands *v.* M. R. I. Co., 123 *id.* 288; L. & P. Co. *v.* Mullen, 176 *id.* 126.

[42] Harman *v.* Chicago, 147 U. S. 396.

[43] P. Co. *v.* Keokuk, 95 U. S. 80; P. Co. *v.* St. Louis, 100 *id.* 423; Vicksburg *v.* Tobin, *ibid.* 430; P. C. *v.* Catlettsburg, 105 *id.* 559.

[44] T. Co. *v.* Parkersburg, 107 U. S. 691; O. P. Co. *v.* Aiken, 121 *id.* 444.

[45] Guy *v.* Baltimore, 100 U. S. 434; *infra,* Section 50.

[46] A. S. & W. Co. *v.* Speed, 192 U. S. 500.

of those duties, the sale of the imported goods within any state, and as there is an express constitutional prohibition of state duties on imports and exports, excepting such duties as may be absolutely necessary for executing the inspection laws of the state, it follows that a state cannot require under a penalty importers of foreign goods by the bale or package, and vendors of the same by wholesale, to take out a license as a prerequisite to the sale of such imported goods in the original form and package in which they are imported, and before they become incorporated with the mass of property in the state.[47] On the same principle, a state cannot impose an *ad valorem* tax upon imported goods remaining in their original cases in the hands of the importer, even though a similar tax be imposed on all merchandise in the state;[48] and a state cannot tax an auctioneer's sales of imported goods in their original cases and for the account of the importers thereof.[49] Yet separately wrapped packages of foreign dry goods brought into a state in wooden cases are subject to state taxation upon their being taken from their cases.[50] Merchandise brought from a foreign country and which by the terms of the contract of purchase is not to be at the risk of the purchaser until delivered to him in the port of entry, does not come within the constitutional meaning of the term "imports," and such goods, though in their original packages, may be taxed by the state in whose port their purchase is completed by delivery.[51]

[47] Brown *v.* Maryland, 12 Wheat. 419.

[48] Low *v.* Austin, 13 Wall. 29.

[49] Cook *v.* Pennsylvania, 97 U. S. 566.

[50] May *v.* New Orleans, 178 U. S. 496. Almy *v.* California, 24 How. 169, is explained in Woodruff *v.* Parham, 8 Wall. 123, 138, and should have been decided upon the ground that the tax in question was a tax upon the transportation of goods from one state to another, and, therefore, a regulation of commerce and as such void.

[51] Waring *v.* The Mayor, 8 Wall. 110.

State inspection laws.

49. The object of inspection laws is to improve the quality of articles produced by the labour of a country, to fit them for exportation, or, it may be, for domestic use. They act upon the subject before it becomes an article of foreign commerce, or of commerce among the states, and prepare it for that purpose.[52] Such laws prescribe some or all of certain requisites, such as the quality of the article, the form, capacity, dimensions, weight, or marking of the package, and, to enforce compliance with their requirements, they provide for supervision by public officers.[53] Therefore, a state may prohibit under a penalty the exportation, without inspection, of articles produced in the state, such as tobacco,[54] and may require the official measurement of coal,[55] and lumber,[56] and the inspection of fertilizers.[57] The words "inspection laws," "imports," and "exports," as used in the Constitution, having exclusive reference to property, as distinguished from persons,[58] a state *per capita* tax on immigrants cannot be sustained as a means of executing the inspection laws of a state.[59] But a state may not, under the pretence of an inspection law, regulate interstate commerce, as by requiring an inspection by a public officer, upon payment of fees, of all meat slaughtered more than one hundred miles from the place of sale, when there is no such requirement with regard to meat slaughtered at a less distance from the place of sale;[60] or by requiring an inspection of

[52] Gibbons *v.* Ogden, 9 Wheat. 1, 203, per Marshall, C. J.
[53] Turner *v.* Maryland, 107 U. S. 55.
[54] Turner *v.* Maryland, *ubi supra.*
[55] P. & S. C. Co. *v.* Louisiana, 156 U. S. 590.
[56] L. & P. Co. *v.* Mullen, 176 U. S. 126.
[57] P. G. Co. *v.* North Carolina, 171 U. S. 345.
[58] Crandall *v.* Nevada, 6 Wall. 35.
[59] People *v.* C. G. T., 107 U. S. 59.
[60] Brimmer *v.* Rebman, 138 U. S. 78.

all flour ground without the state, when there is no such requirement as to flour ground within the state;[61] or by prohibiting the sale of meat which has not been inspected on the hoof within the state;[62] or by requiring, as a prerequisite to the shipment of alcoholic liquors into the state, an analysis by the state chemist of a sample thereof.[63]

Taxation discriminating against goods from other states.

50. A state may tax goods brought in from another state, though in the hands of the consignee and in the original packages;[64] but a state cannot by taxation discriminate against either the natural products of, or the goods manufactured in, other states, whether by requiring of every non-resident trader as a prerequisite to his sales of other than agricultural products of or articles manufactured in the state, a higher license fee than is required of traders in domestic goods;[65] or by requiring payment of a license fee by vendors of merchandise "not the growth, produce, or manufacture" of the state, no license fee being required of vendors of domestic merchandise;[66] or by charging vessels laden with the products of other states for the use of public wharves, when vessels laden with the products of the state are permitted to use such wharves without charge;[67] or by requiring a non-resident merchant desiring to sell by sample in the state to pay for a license to do that business a sum to be ascertained by the amount of his

[61] Voight *v.* Wright, 141 U. S. 62.

[62] Minnesota *v.* Barber, 136 U. S. 313.

[63] Vance *v.* W. A. V. Co., 170 U. S. 438.

[64] Woodruff *v.* Parham, 8 Wall. 123; Brown *v.* Houston, 114 U. S. 622; Emert *v.* Missouri, 156 *id.* 296.

[65] Ward *v.* Maryland, 12 Wall. 418. Bradley, J., concurred, but held that the license required would be equally void if it imposed upon residents the same burden for selling goods as it imposed upon non-residents, for it would be in fact a duty upon importations from one state to another.

[66] Welton *v.* Missouri, 91 U. S. 275; Webber *v.* Virginia, 103 *id.* 344.

[67] Guy *v.* Baltimore, 100 U. S. 434.

stock in trade in the state where he resides, and in which he has his principal place of business;[68] or by imposing a tax on each selling agent of a foreign dealer while not imposing a tax upon the selling agents of a domestic dealer;[69] or by imposing a license tax upon wholesale dealers in brewed or malt liquors but exempting from such tax all dealers paying a lesser tax for the privilege of manufacturing liquors within the state;[70] or by statutes under the guise of inspection laws imposing discriminating taxes upon products of other states, as, for instance, by requiring that no meat slaughtered one hundred miles or more from the place of sale should be offered for sale unless previously inspected by a local official and a fee paid therefor, while requiring no inspection to be made of meat slaughtered within one hundred miles of the place of sale;[71] or by requiring flour brought into the state and offered for sale therein to be inspected by a state official and a fee paid therefor, while requiring no inspection to be made of flour produced within the state.[72] Nor can a state, under the act[73] which was passed to legislatively overrule the Original Package Case,[74] establish, so far as regards the sale of intoxicating liquors, a system which would in effect discriminate between interstate and domestic commerce in commodities whose manufacture and use are permitted by the state.[75] There is no unlawful discrimination in requiring prepayment of the tax by vendors of the products of other states, while vendors of domestic goods are permitted to pay the same tax on re-

[68] Corson *v.* Maryland, 120 U. S. 502, 506.
[69] Walling *v.* Michigan, 116 U. S. 446.
[70] Lyng *v.* Michigan, 135 U. S. 161.
[71] Brimmer *v.* Rebman, 138 U. S. 78.
[72] Voight *v.* Wright, 141 U. S. 62.
[73] Act of 8th August, 1890, 26 Stat. 313, c. 728.
[74] Leisy *v.* Hardin, 135 U. S. 100.
[75] Scott *v.* Donald, 165 U. S. 58, 100.

turns from time to time.[76] On the other hand, non-discriminating taxation may lawfully be imposed by a state, as where a state levies a tax upon all peddlers of sewing machines without regard to their place of manufacture,[77] or by taxing the gross yearly commissions of all general agents selling on commissions.[78] A state which taxes the traffic in any intoxicating liquors at any place other than the place of manufacture does not impose a discriminating tax upon a dealer in liquors manufactured in another state.[79] Of course, one who claims under these cases exemption from the burden of state taxation must prove his right and must show a discrimination in taxation as against goods brought in from another state.[80] The cases that have been cited forbid only that state taxation which discriminates in favour of the products of the taxing state and against goods brought in from another state, but there are other cases which rest upon the broad principle that a state cannot impose any tax or other restriction "upon the citizens or inhabitants of other states for selling, or seeking to sell, their goods in such state before they are introduced therein,"[81] the ground of decision being, that such a tax does not subject to taxation goods brought from another state in common with the mass of property in the taxing state, but that, on the other hand, such a tax stands as a barrier in the way of the manufacturer or merchant of another state and hinders him in the introduction of his goods into the taxing state.[82] It is no answer to this to

[76] Hinson *v.* Lott, 8 Wall. 148.

[77] M. Co. *v.* Gage, 100 U. S. 676; Emert *v.* Missouri, 156 *id.* 296; Rash *v.* Farley, 159 *id.* 263.

[78] Ficklen *v.* Shelby County Taxing District, 145 U. S. 1.

[79] R. B. Co. *v.* Brister, 179 U. S. 445.

[80] Downham *v.* Alexandria Council, 10 Wall. 173; Brennan *v.* Titusville, 153 U. S. 289; Stockard *v.* Morgan, 185 *id.* 27.

[81] Robbins *v.* Shelby County Taxing District, 120 U. S. 489, 494.

[82] Asher *v.* Texas, 128 U. S. 129; Brennan *v.* Titusville, 153 *id.* 289; N. & W. Ry. *v.* Sims, 191 *id.* 441; *cf.* A. S. & W. Co. *v.* Speed, 192 *id.* 500.

say, as Waite, C. J., and Field and Gray, JJ., said,[83] that if citizens of other states cannot be taxed in the same way for the same business, there will be discrimination against the inhabitants of the taxing state and in favour of those of other states, for the conclusive reply is that while a state may without discrimination tax its domestic trade, it cannot, with or without discrimination, tax or otherwise regulate that interstate commerce which has not been terminated by the merging of its subject in the mass of property within the jurisdiction of the taxing state. It must be remembered that, as Bradley, J., said,[84] "to carry on interstate commerce is not a franchise or a privilege granted by the state; it is a right which every citizen of the United States is entitled to exercise under the Constitution and laws of the United States."

The original package doctrine.

51. In Brown *v.* Maryland,[85] a statute of Maryland requiring, *inter alia,* all importers of foreign articles, "by bale or package," to take out a license, was held to conflict with the prohibition of state duties upon imports, as well as with the federal power of regulating commerce, Marshall, C. J., saying[86] that "when the importer has so acted upon the thing imported, that it has become incorporated and mixed up with the mass of property in the country, it has, perhaps, lost its distinctive character as an import, and has become subject to the taxing power of the state; but while remaining the property of the importer, in his warehouse, in the original form or package in which it was imported, a tax upon it is too plainly a duty upon imports to escape the prohibition in the Constitution."

[83] Robbins *v.* Shelby County Taxing District, 120 U. S. 489, 501.
[84] Crutcher *v.* Kentucky, 141 U. S. 47, 57.
[85] 12 Wheat. 419.
[86] P. 441.

Marshall, C. J., also said [87] that "Congress has a right, not only to authorize importation, but also to authorize the importer to sell," but he qualifies this [88] by his concession that the police power "remains, and ought to remain, with the states." It was subsequently held that the prohibition of duties upon imports and exports had no reference to interstate commerce; [89] and the congressional right of authorization of importation and the consequent right of authorization of the sale of imported articles have no relevancy to state taxation or to state police control of interstate commerce, and, therefore, a state tax upon sales at auction was held to be applicable to products of other states, even though the articles were sold in their original and unbroken packages.[90] It was also held that coal brought from another state by vessel, and unladen, was subject to state taxation in its port of destination.[91] On the other hand, it was held that a state cannot forbid a common carrier to bring liquors into the state, and that such legislation does not release the carrier from liability in damages for his refusal to carry the liquor.[92] It was also held that beer brought from another state in barrels and in cases was not subject to seizure under a state statute prohibiting the sale of intoxicating liquors,[93] the ground of decision being that beer is an article of lawful commerce, and, as such, entitled, under the commerce clause, to be brought into every state, and, so long as it remains in its or-

[87] P. 447.

[88] P. 443.

[89] Woodruff *v.* Parham, 8 Wall. 123; A. S. & W. Co. *v.* Speed, 192 U. S. 500.

[90] Woodruff *v.* Parham, 8 Wall. 123.

[91] Brown *v.* Houston, 114 U. S. 622; P. & S. C. Co. *v.* Bates, 156 *id.* 577.

[92] Bowman *v.* C. & N. W. Ry., 125 U. S. 465. Waite, C. J., and Harlan and Gray, JJ., dissented.

[93] Leisy *v.* Hardin, 135 U. S. 100. Harlan, Gray, and Brewer, JJ., dissented.

iginal package, to be free from state control. The doctrine of this case was obviously applicable to all importation and transportation of intoxicating liquors, and it necessarily was a cause of irritation to those people who conscientiously believe it to be the duty of every government to prohibit all traffic in, or use of, such liquors. There naturally followed an act of Congress,[94] providing "that all fermented . . . liquors . . . transported into any state or territory or remaining therein for use, consumption, or sale or storage therein, shall upon arrival in such state or territory be subject to the operation and effect of the laws of such state or territory enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquids or liquors had been produced in such state or territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise." As the court's ruling in Leisy *v.* Hardin was based upon an affirmation of the constitutional exemption of articles of interstate commerce from the exercise of the state's police power, there was some ground for supposing that an act of Congress could not confer upon the states any power in the premises, for, as Taney, C. J., had said,[95] "it will hardly be contended that an act of Congress can alter the Constitution, and confer upon a state a power which the Constitution declares it shall not possess. And if the grant of power to the United States to make regulations of commerce is a prohibition to the states to make any regulation upon the subject, Congress could no more restore to the states the power of which they were thus deprived, than it could authorize them to coin money or make paper money a tender in the payment of debts, or to do any other act

[94] Act of 8th August, 1890, 26 Stat. 313, c. 728.

[95] License Cases, 5 How. 580.

forbidden to them by the Constitution." Nevertheless, the court held[96] that the act was constitutional because it was in effect a national regulation of interstate commerce in liquors, and because it imparted no power to the states not then possessed and simply removed an impediment created by the absence of a specific utterance on the part of Congress.[97] It has since been held that under this act a state cannot establish a system discriminating "between interstate and domestic commerce in commodities whose manufacture and use are not prohibited by its laws."[98] It has also been held that a state may prohibit the sale of oleomargarine in imitation of butter, and that the act of Congress[99] defining butter and imposing a tax upon oleomargarine does not authorize transportation and sale in violation of such a statute,[100] the ground of decision being that the doctrine of Leisy *v.* Hardin does not justify the broad contention that the states are powerless to prevent the sale of subjects of commerce, if their sale may cheat the people into purchasing something which is wholly different from that which its condition and appearance import. On the other hand, it has been held[1] that oleomargarine, being an article of food and commerce, a state statute cannot prohibit its transportation from another state and its sale in an original ten-pound package. It has also been held[2] that a state may prohibit the sale of cigarettes brought in from another state, when the size of

[96] *In re* Rahrer, 140 U. S. 545.

[97] Harlan, Gray, and Brewer, JJ., concurred in the judgment, but not in all the reasoning of the court.

[98] Scott *v.* Donald, 165 U. S. 58, 100.

[99] Act of 2d August, 1886, 24 Stat. 209, c. 840.

[100] Plumley *v.* Massachusetts, 155 U. S. 461, Fuller, C. J., and Field and Brewer, JJ., dissenting. See also Crossman *v.* Lurman, 192 U. S. 189.

[1] Schollenberger *v.* Pennsylvania, 171 U. S. 1. Harlan and Gray, JJ., dissented.

[2] Austin *v.* Tennessee, 179 U. S. 343. White, J., concurred, and Fuller, C. J., and Brewer, Shiras, and Peckham, JJ., dissented.

the original package is such as to indicate an intention to sell at retail that which the state in its exercise of the police power has forbidden to be sold, Brown, J., saying,[3] "The whole theory of the exemption of the original package from the operation of state laws is based upon the idea that the property is imported in the ordinary form in which from time to time immemorial foreign goods have been brought into the country."

Transportation—*(a)* State regulation in the exercise of the police power.

52. The construction of railways and the consequent development of systems of through transportation have required the court to consider in many cases the respective powers of the United States and of the states in regard to transportation. Before railways came into use the then ordinary appliances of internal transportation, canals and turnpike roads, were regarded as "component parts" of "that immense mass of legislation which embraces everything within the territory of a state not surrendered to the general government."[4] It was subsequently held that a state through which the Cumberland road passed could not tax coaches carrying the mail or persons traveling on the coaches in the service of the United States, but the exemption from taxation was, in the several judgments of the court, based exclusively upon the terms of the contracts between the United States and the several states through which that road ran, as made by the statutes of those states authorizing the construction of the road.[5]

Under the later cases a state may, in the exercise of its police power, regulate transportation so far as may be

[3] P. 359.

[4] Gibbons *v.* Ogden, 9 Wheat. 203, 235.

[5] Searight *v.* Stokes, 3 How. 151; N., M. & Co. *v.* Ohio, *ibid.* 720; Achison *v.* Huddleson, 12 *id.* 293.

necessary for the protection, safety, and comfort of its citizens, but it may not by such regulations unnecessarily impede or obstruct interstate transportation. A state could, before the passage of the Interstate Commerce Act, require under a penalty all railroads to fix and post their rates of fare and freight and not to charge in excess therefor.[6] A state may regulate the charges of a private warehouse for the storage of grain, although that grain be stored in the course of interstate transportation.[7] A state may fix and enforce maximum rates of fare and freight for intrastate transportation on all railways within the state, even though the people in other states may be indirectly affected thereby.[8] A state may forbid discrimination in transportation within its territory, and constitute a commission to revise railway tariffs and to enforce the statute, for it is not to be assumed that the commission will interfere with interstate transportation.[9] A state may forbid railways to employ in a position requiring the use, or discrimination of the form or colour, of signals "any person not having received from a state board a certificate of freedom from colour blindness."[10] A state may require railways to provide separate accommodations for white and coloured persons traveling between points within the state.[11] A state may prohibit the running of freight trains on Sunday on any railway in the state.[12] A state may require railways to place

[6] R. Co. *v.* Fuller, 17 Wall. 560.

[7] Munn *v.* Illinois, 94 U. S. 113; Budd *v.* New York, 143 *id.* 517; Brass *v.* North Dakota, 153 *id.* 391.

[8] C., B. & Q. R. *v.* Iowa, 94 U. S. 155; Peik *v.* C. & N. W. Ry., *ibid.* 164. Field and Strong, JJ., dissented in each case.

[9] Stone *v.* F. L. & T. Co., 116 U. S. 307; Stone *v.* I. C. R., *ibid.* 347; Stone *v.* N. O. & N. E. R., *ibid.* 352.

[10] N., C. & S. L. Ry. *v.* Alabama, 128 U. S. 96.

[11] L., N. O. & T. Ry. *v.* Mississippi, 133 U. S. 587. Harlan and Bradley, JJ., dissented. C. & O. Ry. *v.* Kentucky, 179 U. S. 388.

[12] Hennington *v.* Georgia, 163 U. S. 299.

guard posts in the prolongation of the line of bridge trusses so that in case of derailment the posts, and not the bridge trusses, shall receive the blow of the derailed locomotive or car,[13] and a state may prohibit the heating of passenger cars, other than dining cars, "by any stove or furnace kept inside the car or suspended therefrom."[14] A state may require all regular passenger trains running wholly within the state to stop at all county seats long enough to take on and discharge passengers.[15] A state may forbid a common carrier of passengers to limit its liability by contract.[16] A state may forbid a common carrier to limit its liability save by an agreement in writing signed by the owner of the goods, for such a requirement is the establishment of a rule of evidence, and not a regulation of contracts as to interstate transportation.[17] A state may require all railways within the state to stop certain of their trains running each way daily, at stations in towns containing a specified number of inhabitants and to stop for a time sufficient to receive and let off passengers.[18] A state may require railways receiving freight for transportation to a point on a connecting line to be liable for damages caused on the connecting line, for the railway may lawfully limit its contract of transportation to its own line.[19] A state may authorize a municipality to prohibit by ordinance the running of any trains within its limits at a speed greater than that fixed in the ordinance.[20] A state may require intersecting railways to provide

[13] N. Y., N. H. & H. R. *v.* New York, 165 U. S. 628.

[14] N. Y., N. H. & H. R. *v.* New York, *supra.*

[15] Gladson *v.* Minnesota, 166 U. S. 427; *cf.* L. S. & M. S. Ry. *v.* Ohio, 173 *id.* 285; I. C. R. *v.* Illinois, 163 *id.* 142.

[16] C., M. & S. P. Ry. *v.* Solan, 169 U. S. 133.

[17] R. & A. R. *v.* P. T. Co., 169 U. S. 311.

[18] L. S. & M. S. Ry. *v.* Ohio, 173 U. S. 285.

[19] M., K. & T. Ry. *v.* McCann, 174 U. S. 580.

[20] Erb *v.* Morasch, 177 U. S. 584.

L. of C.

facilities for transferring cars used in the regular business of their respective lines.[21] A state may provide that all railways doing business within the state shall be liable in damages to their employees for any negligence of the railway's servants.[22] A state may require railways to construct and maintain cattle guards and fences under a penalty of double damages.[23] A state may authorize the recovery from railways of double damages for cattle killed or injured at a point where the railway might, but did not, fence.[24] A state may authorize its railroad commission to require a railway to erect and maintain stations at designated villages.[25] A state may prohibit or restrain the sale of wines or liquors imported from foreign countries or brought within its territory from another state, though introduced in an original package or otherwise, or manufactured in the state.[26] A state may prohibit the sale of an adulterated food product, even though it is brought from a foreign country.[27] A state may so regulate the operation of draw-bridges over navigable waters that the traffic on the water and the traffic on the land shall be so conducted as to interfere as little as possible with each other.[28] A state may grant and control the exercise of ferry licenses.[29] A state may establish port regulations for its harbours.[30] A state may au-

[21] W., M. & P. R. *v.* Jacobson, 179 U. S. 287.

[22] M. P. Ry. *v.* Mackey, 127 U. S. 205.

[23] M. P. Ry. *v.* Humes, 115 U. S. 512.

[24] M. & S. L. R. *v.* Beckwith, 129 U. S. 26.

[25] M. & S. L. R. *v.* Minnesota, 193 U. S. 53.

[26] The License Cases, 5 How. 504; Bartemeyer *v.* Iowa, 18 Wall. 129; Beer Co. *v.* Massachusetts, 97 U. S. 25; Foster *v.* Kansas, 112 *id.* 201; Mugler *v.* Kansas, 123 *id.* 623; Act of 8th August, 1890, 26 Stat. 313, c. 728, legislatively limiting the operation of Leisy *v.* Hardin, 135 U. S. 100.

[27] Crossman *v.* Lurman, 192 U. S. 189.

[28] Escanaba Co. *v.* Chicago, 107 U. S. 678.

[29] Fanning *v.* Gregoire, 16 How. 524, 534; Conway *v.* Taylor, 1 Black, 603.

[30] The James Gray *v.* The John Fraser, 21 How. 184.

thorize a municipality to forbid the use of steam power by railways within the municipal limits.[31]

On the other hand, a state, by its police regulations, could not, before the passage of the Interstate Commerce Act, enforce with respect to interstate transportation, a prohibition of a charge of the same, or a greater, toll for a shorter than for a longer distance in the same direction.[32] After the passage of the Interstate Commerce Act such a regulation was *a fortiori* beyond the power of the state.[33] A state may not require all trains carrying interstate passengers to stop at a station where other adequate accommodations were furnished by the railway, especially where the stoppage of through trains at that station requires them to run over a branch line taking them several miles out of their direct course.[34] A state may not require a railway to stop at all county seats, a sufficient time to take on or let off passengers, such express trains as are run only for the transportation through the state of passengers between two points in other states, especially when by other trains adequate accommodations are provided for all local and through transportation to and from each county seat.[35] A state may not require, under a penalty, a report to the state authorities of the name and occupation of every passenger.[36] A state cannot forbid a common carrier to bring into the state intoxicating

[31] R. Co. *v.* Richmond, 96 U. S. 521.

[32] W., S. L. & P. Ry. *v.* Illinois, 118 U. S. 557. Waite, C. J., and Bradley and Gray, JJ., dissented.

[33] L. & N. R. *v.* Eubank, 184 U. S. 27. Gray and Brewer, JJ., dissented. G., C. & S. F. Ry. *v.* Hefley, 158 *id.* 98.

[34] I. C. R. *v.* Illinois, 163 U. S. 142.

[35] C., C., C. & St. L. Ry. *v.* Illinois, 177 U. S. 514; Gladson *v.* Minnesota, 166 *id.* 427.

[36] Sinnot *v.* Davenport, 22 How. 227; Foster *v.* Davenport, *ibid*, 244. New York *v.* Miln, 11 Pet. 102, from the judgment in which Marshall, C. J., and Story, J., dissented, though not formally, is practically, overruled.

liquors.[37] A state may not regulate rates of transportation over a line connecting two points within the state but passing in part through another state.[38]

While a state has, unless restrained by contract, or unless it thereby regulates foreign or interstate commerce, the power to fix by legislation transportation charges within its jurisdiction, and while the presumption is always in favour of the validity of a governmental regulation under legislative authority,[38a] it nevertheless cannot require a railway to carry without reward, nor can it so fix charges as to take private property without just compensation, nor without due process of law.[38b] A state cannot under pretence of regulating rates require railways to carry specified classes of people at rates lower than those fixed by law for all classes.[38c] As the power of fixing rates is administrative, it must be exercised by the legislature [38d] and not by the courts,[38e] but it is within the judicial power, and it is the judicial duty, to restrain that which in the form of regulation operates to deny to the owners of property invested in the conduct of transportation the equal protection of the laws.[38f] The courts must, therefore, when a proper case is presented, determine whether transportation charges as fixed by legislative regulation are,

[37] Bowman *v.* C. & N. W. Ry., 125 U. S. 465.

[38] Hanley *v.* K. C. S. Ry., 187 U. S. 617.

[38] *a* C., M. & St. P. Ry. *v.* Tompkins, 176 U. S. 167, 173.

[38] *b* Stone *v.* F. L. & T. Co., 116 U. S. 307; Dow *v.* Beidelman, 125 *id.* 680, 689; G. R. & B. Co. *v.* Smith, 128 *id.* 174, 179; C., M. & St. P. Ry. *v.* Minnesota, 134 *id.* 418, 458; C. & G. T. Ry. *v.* Wellman, 143 *id.* 339, 344; Budd *v.* New York, *ibid.* 517, 547. Until Congress otherwise directs, a state may regulate the intrastate rates of railways chartered by the United States: Smyth *v.* Ames, 169 U. S. 466; Reagan *v.* M. T. Co., 154 *id.* 413.

[38] *c* L. S. & M. S. Ry. *v.* Smith, 173 U. S. 684.

[38] *d* C. & G. T. Ry. *v.* Wellman, 143 U. S. 339, 344.

[38] *e* Reagan *v.* F. L. & T. Co., 154 U. S. 362, 399.

[38] *f* Reagan *v.* F. L. & T. Co., *supra;* St. L. & S. F. Ry. *v.* Gill, 156 U. S. 649, 657; C. & L. T. R. Co. *v.* Sandford, 164 *id.* 578, 584; C., B. & Q. R. *v.* Chicago, 166 *id.* 222, 241.

or are not, so unreasonably low as to deprive the carrier of his property without just compensation. Yet a railway may not fix its rates solely with a view to its own interest and ignoring the rights of the public, nor may it fix its rates upon any basis other than that of the fair value of the property used and the fair value of the services rendered, or, in other words, a fair return upon the capital invested.[38g] In this connection Harlan, J., said:[38h] "The basis of all calculations as to the reasonableness of the rates to be charged by a corporation maintaining a highway under legislative sanction must be the fair value of the property being used by it for the convenience of the public. And in order to ascertain that value, the original cost of construction, the amount expended in permanent improvements, the amount and market value of its bonds and stock, the present as compared with the original cost of construction, the probable earning capacity of the property under particular rates prescribed by statute, and the sum required to meet operating expenses, are all matters for consideration and are to be given such weight as may be just and right in each case. We do not say that there may not be other matters to be regarded in estimating the value of the property. What the company is entitled to ask is a fair return upon the value of that which it employs for the public convenience. On the other hand, what the public is entitled to demand is that no more be exacted from it for the use of the public highway than the services rendered by it are reasonably worth."[38i]

Much misapprehension with regard to the proper limits of the exercise of governmental power over

[38] *g* M. & St. L. Ry. *v.* Minnesota, 186 U. S. 287.

[38] *h* Smyth *v.* Ames, 169 U. S. 466, 546; 171 *id.* 361.

[38] *i* See also S. D. L. & T. Co. *v.* National City, 174 U. S. 739, 757; Stanislaus County *v.* S. J. & K. R. C. & I. Co., 192 *id.* 201; S. D. L. & T. Co. *v.* Jasper, 189 *id.* 439.

the railways has resulted from reasoning by analogy, for the logical value of that method of reasoning is dependent upon an exact similarity in all points between the subjects of comparison. It is a truism that railways are public highways, and yet it is clear that they are not highways in the sense that navigable rivers and roads, whether common or improved, are highways. Railways differ from those other highways in three important respects, which deprive the analogy of much of its value. In the first place, the railways have in the United States been constructed, in almost every instance, not by public officers expending the public funds, but by private persons under corporate organizations expending private funds realized from the sale of corporate bonds or shares, the investors taking all the risks, and relying upon the financial results of operation under the corporate franchises for income and reimbursement of outlay. In the second place, the railway is not only an artificial highway, but also it can only be used as a highway in connection with artificial means of transportation which the railway must itself supply and operate. The earlier railways in England and in this country were chartered upon the theory that the company would provide the road and the customers find their several modes of transportation, but it was soon discovered that the magnitude, complexity, and dangers of the business were too great to admit of its conduct in that manner. In the third place, every railway is a common carrier, and, as such is bound to carry at reasonable rates and without unjust discrimination all freight and all passengers that may be offered to the extent of its facilities.

If transportation rates could be treated, without reference to the public interest, as subjects of private bargain between the railway and its customers, it would be lawful for the railway on the one hand to demand whatever sum,

however exorbitant, that the necessities of its customer would compel him to pay, and for the customer, on the other hand, to have his goods carried as nearly free as possible. But that duty to the public which requires the railway to carry all freight at a reasonable rate defines as reasonable that rate which not only adequately remunerates the railway for the transportation of the particular freight, but also enables it to carry that freight without prejudice to its performance of its duty of transporting other classes of freight. In other words, neither the customer, nor the railway, can be permitted to ignore the fact that the railway is not a private, but a common carrier, and that, therefore, its charges must be fixed with reference to its performance of duties to others as well as to the particular customer.

Local freight costs the railways more than through freight. By reason of the fluctuation in its demand upon the terminal facilities, rolling stock, and labour it involves a large outlay in capital and in cost of administration, with uncertainty as to the amount of return in any given period. It necessitates the frequent transportation of light loads, and a consequent loss of income from unused facilities and unemployed labour. Its necessary sidings, switches, and frogs increase the perils of operation. On the other hand, through freight can be transported in full loaded cars, and with the minimum of labour, by reason of certainty as to the duration of the trip and the demands upon that labour.

All freight is not of equal bulk or value, nor is it necessarily received, carried, or delivered in precisely the same manner. It may be received and delivered at the station and loaded and unloaded by the railway employees; it may be received and delivered at the railway sidings, but loaded and unloaded by the consignor or consignee; it may be received from and delivered to sidings on private premises, and loaded or unloaded there by the consignor

or consignee; or it may be received in one of these ways and delivered in another. So also the stipulated speed of transportation may vary. A railway also has to deal both with retail and wholesale customers, that is, with those who at their option make occasional use of its transportation facilities, and with others who make a prearranged regular and constant use of these facilities.

It is to the interest of both the public and the railways that rates should be sufficiently large to yield an adequate return for the capital invested, to maintain the plant in a condition of efficiency, and to permit the railway to avail itself of such improvements as may be, from time to time, made in machinery and appliances. The railway plant includes not merely the roadbed and main tracks, but also the terminal facilities, the way stations, the sidings necessary therefor, the rolling stock, and the skilled labour upon which devolves the maintenance and operation of the road. The traffic must be steady in order that there may be no loss from unused machinery and unemployed labour. Return freight must be provided in order to avoid as far as possible the transportation of empty cars. The cost of moving freight varies upon different lines, and upon different parts of the same line, in accordance with the grades, the more or less expensive character of the tunnels, bridges, viaducts, and other engineering appliances that have been provided to overcome natural obstacles, and the cost to the railway of its machinery, fuel, and labour. The railway manager has, therefore, in fixing a rate to determine the cost of moving a given quantity of freight of the particular kind over the designated distance in the desired manner, and to that end he must consider several elements, to each of which due weight must be given: first, the extent to which the company's way or terminal facilities and labour will be used in handling the freight; second, the necessary demand of that freight upon

motive-power and rolling stock, and the possibility of obtaining a full return freight; third, the length of the haul and the favourable or unfavourable character of the grades; fourth, the degree of expedition required, and the consequent accommodation to, or disturbance of, the general traffic arrangements of the road; fifth, the constant, or fluctuating, character of the demands of the particular freight upon the road's facilities; and, sixth, the relative bulk and value of the freight and the degree of the carrier's responsibility for its safe transportation. Railways have not been chartered, nor has capital been invested in their construction, upon the theory that they are to do business for less than cost and a reasonable profit upon the investment. The railway manager must, therefore, in order that dividends may be earned, add, after determining the cost of moving and handling the particular freight, such a sum for profit as will, in addition to the company's profits from other sources, furnish an adequate return for the capital invested.

When, therefore, government officers undertake to fix transportation rates, it is only fair and just that they should take into consideration the elements of the problem as it would present itself to the mind of an experienced and intelligent railway manager. And when the courts are called upon to determine the validity of governmental regulations as to rates they may properly give weight to the same considerations.

It is true that the sum of the par of the share and debt capital of every railway line does not always accurately express the exact amount of capital invested in the line. In some cases, more, or less, of the share capital is only water, and even more or less of the debt capital may have been issued at a discount. In other cases, and this is certainly true of the great trunk lines, the sum of the par of the share and debt capital is, by reason of past ex-

penditure of income in betterments, and, in some cases and to large amounts, by reason of issues of additional share capital at a premium, very much less than the amount actually invested in the line.

Transportation—*(b)* Regulation by taxation.

The United States may, in the exercise of the power to regulate commerce, impose a duty payable by shipping companies in respect of passengers, not citizens of the United States, coming from a foreign port into a port of the United States,[39] and such a duty, being an incident of the regulation of commerce and not a tax, is not subject to the constitution requirement of uniformity, and "it operates with the same force and effect in every place where the subject of it is found."[40] A state may require a railway, incorporated by it to construct a line between a point in the state and a point without the state, to transport passengers for a charge not exceeding a fixed sum, and to pay to the state a percentage of the whole amount which may be received for the transportation of passengers; the court holding that the payment to the state is not a tax upon interstate transportation but a charge for the use of improved facilities of transportation which the state, by its agent, the railway, has constructed and for whose use it has a right to charge.[41] A state may impose a tax upon the actual cash value of every share of the capital stock of a railway incorporated by it even though the railway does interstate business.[42] A state may impose on every

[39] Act of 3d August, 1882, 23 Stat. 214; The Head Money Cases, 112 U. S. 580.

[40] Per Miller, J., 112 U. S. 594.

[41] B. & O. R. *v.* Maryland, 21 Wall. 456. Miller, J., page 475, dissented, holding that the state could not raise a revenue from all persons going from, or through, the state by railway to a point beyond the state. And compare Allen *v.* P. P. C. Co., 191 U. S. 171.

[42] Minot *v.* P., W. & B. R., The Delaware Railroad Tax Case, 18 Wall. 206.

railway operating within the state a franchise tax, to be determined in amount by multiplying the average gross receipts per mile by the number of miles operated within the state, the ground of decision being that the state which grants the franchise may annex conditions to its exercise, and may measure the value of the franchise by the gross receipts earned by operation under that franchise.[43] A state may tax the tolls received by a railway chartered by another state, but owning a line within the taxing state, for the use of such line by another railway.[44] A state may tax the capital stock of a car company in the proportion that the number of miles run by its cars within the state bears to the whole number of miles run by its cars in that and other states.[45] A state may require a company doing both a domestic and an interstate business to take out a license.[46] A state may tax the capital stock of a consolidated corporation chartered by it, and one of whose constituent corporations is a foreign corporation.[47] A state may tax transportation between two points within

[43] Maine *v.* G. T. Ry., 142 U. S. 217. Bradley, Harlan, Lamar, and Brown, JJ., dissented. A state cannot, upon this principle, tax a corporation created by an act of Congress: California *v.* C. P. R., 127 U. S. 1. And a state cannot tax the right of transporting interstate passengers within its borders: Allen *v.* P. P. C. Co., 191 U. S. 171.

[44] N. Y., L. E. & W. R. *v.* Pennsylvania, 158 U. S. 431.

[45] P. P. C. Co. *v.* Pennsylvania, 141 U. S. 18. (Field, Bradley, and Harlan, JJ., dissented, on the ground that the tax was in reality imposed on cars which only came within the state in pursuit of commerce, and was, therefore, void under the principle of Hays *v.* P. M. S. Co., 17 How. 596.) P. P. C. Co. *v.* Hayward, 141 U. S. 36; C., C., C. & S. L. Ry. *v.* Backus, 154 *id.* 439; A. R. T. Co. *v.* Hall, 174 *id.* 70; U. R. T. Co. *v.* Lynch, 177 *id.* 149. And a state, in taxing an express or telegraph company, may regard the mileage or property within the state not strictly locally but as part of a system operated in several states: A. E. Co. *v.* Ohio, 165 U. S. 194, 166 *id.* 185; A. E. Co. *v.* Kentucky, *ibid.* 171; W. U. T. Co. *v.* Missouri, 190 *id.* 412; *cf.* Fargo *v.* Hart, 193 *id.* 490.

[46] Osborne *v.* Florida, 164 U. S. 650; P. Co. *v.* Adams, 189 *id.* 420. See also Allen *v.* P. P. C. Co., 191 *id.* 171.

[47] Ashley *v.* Ryan, 153 U. S. 436.

the state but passing in part through another state, the tax being "determined in respect of receipts for the proportion of transportation within the state."[48] A state may impose a privilege tax on the business of a railway company in transporting passengers in cabs to and from a station within the state.[49] A state may impose a tax upon sales at auction of goods which are the product of other states, and which are sold in their original and unbroken packages, the tax having a uniform application to sales at auction within a specified territory, and not discriminating as against sales at auction of the products of other states.[50] A state may tax coal consigned by a resident of another state for sale and afloat in a port of the taxing state in the vessel in which it had been transported.[51] And a state may tax timber cut in its forests, though owned by a resident of another state and deposited at a place from whence it is to be shipped to another state.[52]

A state may not impose a capitation tax on persons leaving the state by railroad, stage coach, or otherwise.[53] Curiously enough, this case is referred to in the later judgments as if it had been decided on the ground taken in the dissenting judgment,[54] that the tax was void because it imposed "a burden upon commerce among the several states," whereas the judgment of the court was put[55] on the ground that a state tax on the interstate transportation of passengers is void because it is an interference with the freedom of transit of citizens to the seat of government

[48] L. V. R. *v.* Pennsylvania, 145 U. S. 192.
[49] New York *v.* Knight, 192 U. S. 21.
[50] Woodruff *v.* Parham, 8 Wall. 123.
[51] Brown *v.* Houston, 114 U. S. 622; P. & S. C. Co. *v.* Bates, 156 *id.* 577.
[52] Coe *v.* Errol, 116 U. S. 517.
[53] Crandall *v.* Nevada, 6 Wall. 35.
[54] By Chase, C. J., and Clifford, J.
[55] By Miller, J.

and is consequently an infringement upon the federal supremacy. A state may not impose, as affecting interstate commerce, a tax on freight.[56] A state may not impose a privilege tax at a fixed rate per car on all cars run by railways not owning the cars, so far as affects cars used in the transportation of passengers into, through, or out of, the state.[57] A state may not, so far as affects interstate commerce, tax the gross receipts of corporations engaged in the business of running cars over any of the railways of the state.[58] A state may not tax the gross receipts of the transportation of passengers or goods in interstate commerce.[59] A state may not require a railway company, being a link in a through line of interstate transportation, to pay a license fee for maintaining an office for the sale of tickets.[60] A state may not require an agent of an interstate transportation line to pay a license fee for soliciting passenger traffic between points in other states;[61] nor require agents of foreign express companies to take out licenses, and satisfy the state authorities that the company has an actual capital to the amount fixed in the taxing statute.[62] A state may not, directly or indirectly, tax the importation of passengers.[63] A state may not impose a

[56] The State Freight Tax, 15 Wall. 232; Swayne and Davis, JJ., dissented; E. Ry. *v.* Pennsylvania, 15 Wall. 282.

[57] Pickard *v.* P. S. C. Co., 117 U. S. 34; Tennessee *v.* P. S. C. Co., *ibid.* 51. See also Allen *v.* P. P. Co., 191 *id.* 171.

[58] Fargo *v.* Michigan, 121 U. S. 230.

[59] P. & S. S. Co. *v.* Pennsylvania, 122 U. S. 326, overruling the State Tax on Railway Gross Receipts, 15 Wall. 284, from the judgment in which Miller, Field, and Hunt, JJ., had dissented.

[60] N. & W. R. *v.* Pennsylvania, 136 U. S. 114.

[61] McCall *v.* California, 136 U. S. 104; Fuller, C. J., and Brewer and Gray, JJ., dissented.

[62] Crutcher *v.* Kentucky, 141 U. S. 47.

[63] The Passenger Cases, 7 How. 283; Taney, C. J., and Daniel, Nelson, and Woodbury, JJ., dissented; Henderson *v.* The Mayor, 92 U. S. 259; Chy Lung *v.* Freeman, *ibid.* 275; People *v.* Compagnie Générale Transatlantique, 107 U. S. 59.

stamp duty upon bills of lading for the transportation of goods from a port in one state to a port in another.[64]

While a state may tax the property of those persons, natural or corporate, who may be by residence subject to its jurisdiction, even if that property be invested in ships,[65] yet a state may not tax property invested in shipping, whose owners are not personally subject to its jurisdiction, and which come into its ports in the pursuit of commerce,[66] and this exemption is not adversely affected by a temporary enrollment of a ship in a port of the taxing state.[67] Nor can a state tax shipping as such, when engaged in foreign or interstate commerce, though its owners be subject to its jurisdiction,[68] for taxation so imposed amounts to a regulation of commerce.[69]

Transportation—*(c)* The Interstate Commerce Act.

In the years preceding 1870, the people, recognizing the fact that the development of the Middle and Western states required, as speedily as possible, improved means of communication, facilitated by legislation, and by prodigal grants of state and county aid, the organization and construction of railway lines; but, in the years following 1870, some of the railways having come to regard themselves as mere corporations for private gain, and, as such, entitled to conduct their business without regard to the public in-

[64] Almy *v.* California, 24 How. 169, as explained by Miller, J., in Woodruff *v.* Parham, 8 Wall. 124, 137.

[65] T. Co. *v.* Wheeling, 99 U. S. 273; W. F. Co. *v.* East St. Louis, 107 *id.* 365.

[66] Hays *v.* P. M. S. Co., 17 How. 596; St. Louis *v.* W. F. Co., 11 Wall. 423; G. F. Co. *v.* Pennsylvania, 114 U. S. 196.

[67] Morgan *v.* Parham, 16 Wall. 471; Act of 18th February, 1793, 11 Stat. 306.

[68] Moran *v.* New Orleans, 112 U. S. 69; S. S. Co. *v.* Portwardens, 6 Wall. 31.

[69] Harman *v.* Chicago, 147 U. S. 396.

terest, popular feeling was excited, a reaction came, and some of the states, and afterwards the United States, undertook by legislation to correct the abuses, and enforce correct principles, of railway administration. Hence the Interstate Commerce Act and its amendments,[70] which apply to all interstate common carriers, by railroad or partly by railroad and partly by water, "under a common control, management, or arrangement, for a continuous carriage;" require all charges to be reasonable and just; forbid unjust and unreasonable charges; prohibit the receipt from any person of "a greater or less compensation for any service rendered . . . than that received from any other person for a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions;" forbid undue or unreasonable preferences or discriminations, either personal or local; require reasonable, proper, and equal facilities for the interchange of traffic with other lines, and forbid discrimination in rates as between connecting lines; forbid the receipt of as great, or "greater compensation in the aggregate . . . under substantially similar circumstances and conditions for a shorter than for a longer distance over the same line in the same direction, the shorter being included within the longer distance," provided, however, that the commission may prescribe the extent to which a designated carrier may be relieved from the operation of this prohibition; forbid the pooling of freights, or division of earnings, by competing lines; require publication of foreign and interstate rates; forbid

[70] Act 4th February, 1887, 24 Stat. 379, as amended by Acts of 7th August, 1888, 25 Stat. 382; 2nd March, 1889, 25 Stat. 855; 10th February, 1891, 26 Stat. 743; 11th February, 1893, 27 Stat. 443; 2nd March, 1893, 27 Stat. 531; 1st April, 1896, 29 Stat. 85; 8th February, 1895, 28 Stat. 643; 3d March, 1901, 31 Stat. 1446; 11th February, 1903, 32 Stat. 823; 19th February, 1903, 32 Stat. 847; 2nd March, 1903, 32 Stat. 943.

any advance in rates except after ten days' public notice; permit reductions in rates after three days' public notice; forbid all departures from the published rates; require schedules of rates to be filed with the commission; forbid combinations to prevent continuous carriage; declare carriers to be liable for non-compliance with the acts to any person injured thereby in the full amount of damages, together with a reasonable counsel or attorney's fee; authorize complaint to the commission, or action at law in the federal courts by any person injured by a carrier's non-compliance with the acts; provide that no person shall be excused from attending and testifying or from producing books, etc., on the ground that the testimony, or evidence, documentary or otherwise, required of him may tend to criminate him, but that no person shall be prosecuted, or subjected to any penalty or forfeiture, on account of any transaction, concerning which he may testify, or produce evidence, in any such proceding; subject to punishment by fine the corporation and all directors, officers, or employees violating the act; create a commission of five members, holding office for a limited term, not more than three of the members to be appointed from the same political party; authorize the commission to inquire into the management and operation of carriers, with power to require the attendance and testimony of witnesses and the production of papers, and to that end to invoke the aid of the courts of the United States; vest jurisdiction in the commission to examine and to take testimony upon complaint made by any person, natural or corporate; authorize the commission to investigate of its own motion; forbid the dismissal of a complaint "because of the absence of direct damages to the complainant;" make the findings of the commission *prima facie* evidence in all judicial proceedings; require the commission, and author-

ize any party interested, in case of the carrier's refusal or neglect to obey any lawful order of the commission, to apply in a summary way by petition to the courts of the United States for relief, and vest jurisdiction thereof in such courts, and authorize the court to enter a decree and issue process with right of appeal to the appropriate federal appellate tribunal; authorize the commission to make rules; fix the principal office of the commission in the city of Washington, but authorize it to hold special sessions, and prosecute inquiries, in any part of the United States; authorize the commission to require reports from carriers as to share and debt capital, rates, administration, and accidents to passengers or employees; require the commission to make annual reports to the Secretary of the Interior for transmission to Congress; and provide that carriers may carry free, or at reduced rates, goods for the United States, and municipal governments, or for charitable purposes, or for exhibition at fairs, etc., and may issue mileage, excursion, or commutation passenger tickets, or give reduced rates to ministers of religion, municipal governments for the transportation of indigent persons, inmates of soldiers' and sailors' homes, officers and employees of their own line, and may exchange passes and tickets with other lines. Under the act and its amendments, it has been decided that the Interstate Commerce Commission is a body corporate, with power to sue, and to be sued, in the federal courts.[71] It is not a court, because its members do not hold their offices by the tenure of good behavior, and because the duties imposed upon it are not judicial in their nature. It is, however, a "subordinate administrative, or executive, tribunal,"[72] and, as such, it cannot exercise the legislative power of fixing rates *in*

[71] T. & P. Ry. *v.* I. C. C., 162 U. S. 197.
[72] I. C. C. *v.* Brimson, 154 U. S. 447.

futuro;[73] nor can it indirectly fix rates by determining what would be a reasonable rate, and then obtaining from the courts an order restraining a carrier from making *in futuro* a charge in excess of such rates.[74] In actions to enforce the orders of the commission an appeal from a circuit court now goes, not to the Supreme Court, but to the circuit court of appeals.[75] The provision in section 12 of the act that the commission may "invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of books, etc.," is not open to constitutional objection upon the theory that it imposes upon a judicial tribunal duties which are not in their nature judicial.[76] The commission cannot compel obedience to its orders by entering a judgment subjecting any person to fine or imprisonment, for the power to impose such penalties, in order to compel performances of a legal duty imposed by the act, can only be exercised by a competent judicial tribunal.[77] A witness in any inquiry by or on behalf of the commission could not, before the passage of the Act of 11th February, 1893,[78] be required to answer questions when he stated that his answers might tend to criminate him;[79] but, as that act provided that "no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction . . . concerning which he may testify or produce evidence . . . before said commission . . . in any such case or proceeding" he can now be compelled to answer

[73] C., N. O. & T. P. Ry. *v.* I. C. C., 162 U. S. 184; I. C. C. *v.* C., N. O. & T. P. Ry., 167 *id.* 479; Harlan, J., dissented.

[74] I. C. C. *v.* A. M. Ry., 168 U. S. 144.

[75] I. C. C. *v.* A., T. & S. F. R., 149 U. S. 264.

[76] I. C. C. *v.* Brimson, 154 U. S. 447.

[77] I. C. C. *v.* Brimson, 154 U. S. 447; Fuller, C. J., and Brewer and Jackson, JJ., dissented, and Field, J., did not sit.

[78] 27 Stat. 443, c. 83.

[79] Counselman *v.* Hitchcock, 142 U. S. 547.

notwithstanding the protection afforded by the V Amendment.[80] There is a continuous carriage of goods within the meaning of the act when goods shipped under a through bill of lading from a point in one state to a point in another state are received in transit and carried exclusively within a state by a carrier under a *pro rata* division of the rate, and such intrastate carrier thereby subjects itself to the jurisdiction of the commission so far as regards such transportation.[81] The *pro rata* share of a through rate may, without unlawful discrimination or undue preference, be less than a local rate.[82] Party rate tickets, sold at reduced prices for parties of ten or more in number, do not constitute undue, or unreasonable, preferences in favour of the purchasers thereof, nor unjust, or unreasonable, discriminations as against purchasers of single tickets.[83] In the absence of a general regulation that free cartage from a railway station to the premises of a consignee shall be regarded as a part of a terminal service, railway transportation must be held to end at the railway station, and the furnishing of free cartage to consignees in one town, but not in another town, does not constitute unjust local discrimination;[84] but a rebate allowed to a consignee to compensate for the cost of cartage from the railway station to his premises, when a similar rebate is not allowed to another consignee in the same locality, is an unjust personal discrimination.[85] That an unlawful discriminating rate was allowed, or a rebate paid, in violation of the act, does not prevent liability on the part of the carrier for the freight received and covered by insurance

[80] Brown *v.* Walker, 161 U. S. 591; Shiras, Gray, and White, JJ., dissented.

[81] C., N. O. & T. P. Ry. *v.* I. C. C., 162 U. S. 184.

[82] Parsons *v.* C. & N. W. Ry., 167 U. S. 447.

[83] I. C. C. *v.* B. & O. R., 145 U. S. 263.

[84] I. C. C. *v.* D., G. H. & M. Ry., 167 U. S. 633.

[85] Wight *v.* U. S., 167 U. S. 512.

in the custody of the carrier's agents.[86] The act does not in terms authorize competing carriers to enter into contracts to maintain even reasonable rates.[87] The right of recovery given by the statute for an excess of payment over a rate charged to another shipper under similar conditions is in the nature of a penalty, and the plaintiff must produce full proof thereof, and must show a pecuniary injury to himself resulting from such discrimination.[88] Substantial similarity, or dissimilarity, of circumstances and conditions is a question of fact, to be proved by evidence and finding of the commission thereon is only *prima facie,* and is subject to review by the court.[89] Reduced through rates from a port of entry to a point within the country on goods from abroad, which, except for such reduced rate, would not have come through that port of entry, do not constitute an unjust discrimination as against traffic originating at that port of entry.[90] The commission may administratively determine the circumstances and conditions affecting competitive rates, considering to that end the legitimate interests of the carrier as well as of the shippers, and the legitimate interests of the locality to which the goods are to be carried as well as of the locality from which the goods are shipped.[91] A substantial competition, that is a competition producing a substantial and real effect upon traffic and rate making, is one of the circumstances constituting substantial dissimilarity under the long and short haul clause in sections 3 and 4 of the act,[92] and which may justify a carrier in

[86] M. C. P. & S. Co. *v.* Insurance Co. of N. A., 151 U. S. 368.
[87] U. S. *v.* T. M. F. A., 166 U. S. 290.
[88] Parsons *v.* C. & N. W. Ry., 167 U. S. 447.
[89] I. C. C. *v.* A. M. Ry., 168 U. S. 144.
[90] T. & P. Ry. *v.* I. C. C., 162 U. S. 197.
[91] T. & P. Ry. *v.* I. C. C., 162 U. S. 197.
[92] I. C. C. *v.* A. M. Ry., 168 U. S. 144; L. & N. R. *v.* Behlmer, 175 *id.*

charging a greater compensation for a shorter than for a longer haul.

It was held, before the passage of the Interstate Commerce Act, that a state could require under a penalty all railroads to fix and post their rates of fare and freight and not to charge in excess therefor,[93] but it was held also that a state could not by a police regulation enforce, with respect to interstate transportation, a prohibition of a charge of the same, or a greater, toll for a shorter than for a longer distance in the same direction,[94] and, after the passage of the Interstate Commerce Act, it was held that such a regulation was *a fortiori* beyond the power of the state,[95] for Congress having enacted its long and short haul clause, it was, of course, not lawful for a state to legislate on the same subject. When a company owned by a railway corporation buys coal at the mines under an arrangement alleged to secure preferential rates for the vendors, the Interstate Commerce Commission may, in a proper proceeding in the circuit court, compel the testimony of witnesses and the production of contracts.[96]

The cases in the Supreme Court and the reports of the Interstate Commerce Commission show that the act of 1887 has invited much costly and fruitless litigation. Nevertheless, the legislation is of value in that it has strengthened the hands of those broad-minded railway managers who believe that the interests of their share-

648; E. T., V. & G. Ry. *v.* I. C. C., 181 *id.* 1; I. C. C. *v.* L. & N. R., 190 *id.* 273.

[93] R. Co. *v.* Fuller, 17 Wall. 560.

[94] W., S. L. & P. Ry. *v.* Illinois, 118 U. S. 557; Waite, C. J., and Bradley and Gray, JJ., dissented.

[95] L. & N. R. *v.* Eubank, 184 U. S. 27; Gray and Brewer, JJ., dissented; G., C. & S. F. Ry. *v.* Hefley, 158 U. S. 98.

[96] I. C. C. *v.* Baird, 194 U. S. 25.

holders are best served by fair dealing with customers and with competitors.

The Anti-trust law.

53. The so-called "trusts" are combinations of corporations and properties made, in some cases, by the merger and consolidation of existing associations, and, in other cases, by the organization of corporations to acquire and hold the properties to be consolidated, or the controlling interest in the shares of the corporations to be combined.

The "trusts" are a necessary result of the growth of the country, and of the development of isolated and sparsely settled states into a nation whose territory is covered by a network of railways, whose trade is that of an empire and not that of a village, and whose markets have ceased to be local and have become world-wide. "Trusts" are formed to obtain capital by the sale of bonds and shares, to save the waste of competition, to secure in production, transportation, and distribution the maximum of efficiency at the minimum of cost, to expand trade by reducing the price to the consumer, and by economical operation to increase the net profit to the producer and the carrier.

It is not surprising that the capitalization of our railways, the number of our industrial organizations, and the magnitude of their operations should arouse the public interest, and should cause on the part of unintelligent people more or less fear as to possible consequences. Every great industrial development has excited such fears. The steam engine, the railways, and all forms of labour-saving appliances, from the spinning jenny to the type-setting machine, have seemed, in their turn, to threaten large additions to the ranks of the unemployed, and heavy losses to different classes of people; and yet in each case the result has been the opening of new avenues to employ-

ment, and a substantial advance in civilization. So to-day, no one who is accurately informed as to present industrial conditions can doubt that, because of American financial skill in securing combination of resources and concert of action, and because of increased railway efficiency, the products of industry have been brought to a higher standard than ever before, the labour which produces them is better paid, the market is wider and is better supplied, and the consumer buys upon relatively more favourable terms.

In any legislative regulation of corporations, great or small, by the United States, there are only four classes of people to be considered. There are, first, the investors in the bonds and shares issued by the corporations, that is, those who desire to become partners therein, and to participate in their profits, and who, therefore, in so far as they may properly be regarded as beneficiaries of legislation, can only be aided by the requirement of publicity, that is, by compelling the corporation, under proper penalties, to furnish such information as to its capital, earnings, and disbursements as will enable intending purchasers and owners to determine whether its financial condition be such as to render the purchase or holding of its securities a prudent investment. But the federal law can have nothing to do with the organization of corporations for purposes not directly connected with the exercise by the United States of some power of government, nor can the United States constitutionally regulate the issue, sale, or transfer of the bonds or shares of such corporations, or protect investments therein. There are, secondly, the business rivals or competitors of the trading "trusts." On their behalf complaint is made that those "trusts," in order to destroy competition, discriminate in their prices. But competition is industrial warfare. You cannot have

a real competition that does not compete to the limit. When competition is actively conducted, the seller attains his ends, not only by underselling in order to effect a particular sale, but also by carrying his underselling to the extreme limit of driving his competitors out of business and securing for himself complete control of the market. This is done, as Lord Justice Bowen said,[97] from "the instinct of self-advancement and self-protection, which is the very incentive of all trade. . . . To say that a man is to trade freely, but that he is to stop short at any act which is designed to attract business to his own shop, would be a strange and impossible counsel of perfection," and to attempt to prohibit it "would probably be as hopeless an endeavour as the experiment of King Canute." Is it proposed that there shall be a general legislative regulation of prices, and, if so, what would that amount to? There are, thirdly, the consumers of the goods manufactured or sold by the corporations. So far as they are concerned, it is clear that no act of legislation can effectively prescribe the price at which the products of the corporations are to be sold, for the simple reason that market prices always have been, and always will be, regulated by the operation of the law of supply and demand. Successful commerce buys in the cheapest, and sells in the dearest, market. The seller rightfully seeks the highest price that he can obtain; the buyer, as rightfully, pays as little as he possibly can. There are, fourthly, those who or whose goods are carried by common carriers, and their rights have been adequately regulated and protected by the law.

It is said that the "trusts" have "a tendency to monopoly." The fact is that, except in the cases of patents and copyrights, and of those who control the

[97] Mogul S. S. Co. *v.* McGregor, 23 Q. B. Div. 598; (1892), C. A. 43.

sole and exclusive source of supply of a natural product, it is not possible in this day of the world's history to maintain and enforce, more than temporarily, extortionate prices, for the reason that there is always available a large amount of uninvested capital seeking profitable employment and keenly watching for opportunities of remunerative investment. Therefore, intelligent managers of a successful business do not advance prices to the point at which destructive competition will be invited. Prices of commodities are automatically regulated by the law of supply and demand. When, by reason of an apparent permanence of demand and a present inadequacy of the means of supply, prices rise to a level that gives a reasonable assurance of profit to producers, the surplus capital of the world can always be relied upon to augment the means of supply.

Attempts to regulate trade by legislation are not of new invention. Whenever and wherever there has been an absolute government there have always been attempted restrictions upon trade. In mediæval times it was the theory and the practice that it was the "duty and the right of the state to fix hours of labour, rates of wages, prices, times and places of sale, and quantities to be sold."[98] The selfish commercial policy of England, intelligently directed to the restraint of colonial trade and manufactures, was the great cause of the War of Independence. When the successful revolution had substituted the sovereignty of the people for the supremacy of the Crown, there was naturally a jealousy of governmental power and a determination to guard individual liberty against oppression. The framers of the Constitution of the United States, therefore, founded the government, not only upon the supremacy of the

[98] Mrs. Green, "Town Life in the XV Century."

federal government in the exercise of the powers granted to it, but also and equally upon the independence of the states and the freedom of the citizen. They foresaw the evil effects of an unrestrained exercise of the popular will. They endeavoured to establish and make perpetual the reign of law. They crystallized into the Constitution the great principles of free government, and they made it impossible to hastily change that organic law. They declared in express terms the supremacy of the Constitution and the laws made in pursuance thereof; and they created a Supreme Court whose judgments should give effect to that declaration. They united the states into a nation, with full powers of government, and they reserved to the individual citizen as much freedom as is consistent with the enforcement of law and the maintenance of order. Under the Constitution, there is no warrant for paternalism in congressional legislation.

It is to the states, and not to the United States, that we ought to look for the legislative and administrative regulation of the industrial organizations of the present and the future. The power of the state is ample. A state may create corporations, with or without conditions, and it may authorize a corporation to do any business which an individual may lawfully do. A state may forbid a foreign corporation to do business within its territory; it may permit that business on conditions; and it may, with or without reason, revoke a permission theretofore granted. It may, therefore, enforce with regard to foreign corporations all, and more than all, the restrictions which it enforces with regard to corporations of its own creation. On the other hand, the United States, save as the domestic government of the District of Columbia and the territories, cannot even grant a charter of incorporation, except as a means incidental to the exercise by

the United States of a power of government, and it can control the operations of a corporation chartered by a state only under the power of regulating foreign and interstate commerce. It does not avail to say that the legislation of a state can have no extra-territorial force, and that in order to have a rule of uniform application throughout the country there must be congressional legislation, for the conclusive reply is that every state, under the Constitution, is entitled as of right to determine for itself by what agencies and under what conditions commodities shall be manufactured or sold within its territory, subject only to the paramount right of the United States to levy duties and taxes, and to regulate commercial intercourse. As Fuller, C. J., forcibly said in his dissenting judgment in the Lottery Case,[99] "The scope of the commerce clause of the Constitution cannot be enlarged because of present views of public interest."

In the past the country has had to overcome, under conditions of inadequate transportation facilities, the disintegrating tendencies of the expansion of territory and the growth of population, but as the results of the triumph of the nation in the suppression of the Rebellion, and the development of means of transportation and communication, our perils are now those of governmental consolidation and not those of dissolution. Any legislation which conflicts with the American doctrine that all men are equal before the law, and that equality of rights implies equality of obligations, and that subjects rights of property and freedom of contract to administrative control is dangerous in a republic governed by universal suffrage. The leaders of public opinion will do well to remember that, as Mr. Lecky has said, it is an inexorable condition that all

[99] 188 U. S. 373.

"legislation which seriously diminishes profits, increases risks or even unduly multiplies humiliating restrictions, will drive capital away and ultimately contract the field of employment." [100]

The first of the congressional anti-trust acts [1] was drawn by Senator Hoar,[2] and was passed because of some unintelligent clamour as to "the grave evil of the accumulation in this country of vast fortunes in single hands, or of vast properties in the hands of great corporations," an alleged evil with which the United States cannot, under the Constitution, possibly concern itself.

The Act of 1890 is entitled "An Act to Protect Trade and Commerce against Unlawful Restraints and Monopolies;" declares illegal "every contract, combination in the form of trust, or otherwise, or conspiracy in restraint of trade or commerce among the several states, or territories, or with foreign nations;" and every monopoly, or attempt to monopolize any part of such trade or commerce; subjects to forfeiture, seizure, and condemnation "any property owned under any contract, or by any combination, or person, pursuant to any conspiracy," as aforesaid; imposes penalties upon persons disobeying the act; vests jurisdiction in the courts of the United States; gives a right of action for injury to business or property by reason of anything declared unlawful by the act, with three-fold damages, costs of suit, and attorney's fee; and requires the several district attorneys, under the direction of the attorney-general, to institute proceedings in equity to prevent and restrain such violations.

The Act of 11th February, 1903,[3] provides that in suits brought by the United States under the act precedence

[100] Democracy and Liberty, Vol. II, page 463.

[1] 2nd July, 1890, 26 Stat. 209.

[2] Autobiography of Hon. Geo. F. Hoar, Vol. II, page 363.

[3] 32 Stat. 823.

shall be given, on the filing of a certificate by the attorney-general, and the cause be heard before not less than three judges of the circuit, and that an appeal from the final decree of the circuit court shall lie only to the Supreme Court and must be taken within sixty days. The Act of 14th February, 1903,[4] creates the Bureau of Corporations in the Department of Commerce and Labor, provides for the appointment of a commissioner thereof, a deputy commissioner, and clerks; authorizes the commissioner to make "under the direction and control of the Secretary of Commerce and Labor, diligent investigation into the organization, conduct, and management of the business of any corporation, joint stock company, or corporate combination engaged in the commerce among the several states and with foreign nations, excepting common carriers subject to" the Interstate Commerce Act, and "to gather such information and data as will enable the President of the United States to make recommendations to Congress for legislation for the regulation of such commerce, and to report such data to the President from time to time as he shall require; and the information so obtained, or as much thereof as the President shall direct, shall be made public." The act also confers upon the commissioner in respect to the parties subject thereto all the powers conferred on the Interstate Commerce Commission; and makes it "the province and duty" of the bureau "to gather, compile, publish, and supply useful information concerning corporations doing business within the limits of the United States, as shall engage in interstate commerce, or in commerce between the United States and any foreign country, including corporations engaged in insurance, and to attend to such other duties as may be hereafter provided by law."

[4] 32 Stat. 825.

The Act of 25th February, 1903,[5] appropriates the sum of $500,000 to be expended under the direction of the attorney-general "in the employment of special counsel and agents of the Department of Justice to conduct proceedings, suits, and prosecutions" under the anti-trust acts. The Act of 3d March, 1903,[6] provides for the appointment of an assistant to the attorney-general, an assistant attorney-general, and two confidential clerks to "perform such duties as may be required of them by the attorney-general." The first of the statutes only has been judicially construed.

Of course, in every case in which the statute has been enforced, it has necessarily been held to be constitutional as a regulation of commerce, and not to be open to objection on the ground of interference with the freedom of contract.[7] In N. S. Co. *v.* U. S.[8] the question of constitutionality was fully and ably argued, and it was held that the statute, when construed to forbid a combination to organize a corporation to hold the shares of competing railways, is not open to objection as an infringement upon the reserved powers of the states, but, in his dissenting judgment in that case, White, J.,[9] argued with great force, that commerce as defined in Gibbons *v.* Ogden, is commercial intercourse, and is regulated by prescribing rules for carrying on such intercouse, and that the ownership or transfer of shares in a corporation created by a state cannot be said to be in any sense commercial intercourse, and the prescribing of rules governing the ownership of such shares cannot fall within the power to prescribe rules for regulating commercial intercourse. White, J.,

[5] 32 Stat. 854.
[6] 32 Stat. 1031, 1062.
[7] U. S. *v.* J. T. A., 171 U. S. 505.
[8] 193 U. S. 197.
[9] Fuller, C. J., and Peckham and Holmes, JJ., concur.

also argued that the power to regulate commerce includes the power to regulate the instrumentalities of commerce, and that means the regulation, not of their acquisition and ownership, but of their employment and operation, and that because the ownership of property, if acquired, may possibly be so used as to burden commerce, it does not follow that to acquire and own is to burden.

Each of the cases also required of the court a construction of the statute, and a determination whether or not the facts in each case brought it within the statute. The general principles which can be deduced from the cases are these:

1. The word "unlawful" in the title of the statute has reference only to those contracts which the statute makes unlawful, and does not operate to qualify the expression of the legislative will in the body of the statute that "every" contract in restraint of foreign and interstate trade shall be unlawful,[10] but, in the more recent judgments of the court, the force of those words has been materially qualified by the determination that exclusive licenses to manufacture and sell under patents for inventions are not within the statute, and by Mr. Justice Peckham's admissions in the judgments of the court in U. S. *v.* T. M. F. A.,[11] in U. S. *v.* J. T. A.,[12] and in Hopkins *v.* U. S.[13] that neither a contract of partnership, nor the withdrawal of a competitor from business, nor the appointment by competitors of a joint selling agent, nor the purchase of an additional plant, nor "the formation of a corporation for business or manufacturing purposes," nor an agreement collateral to a contract of sale, and requiring the competitor to abstain from again entering into the

[10] U. S. *v.* J. T. A., 171 U. S. 505.
[11] 166 U. S. 290.
[12] 171 U. S. 505.
[13] 171 U. S. 578.

business within a designated territory and during a specified time, are within the prohibition of the statute. These conceded exceptions from the prohibitions of a statute, which expresses no exceptions, would seem to destroy the inclusive force claimed for the words "every" and "otherwise."

2. The term "contracts in restraint of trade," as used in the statute, includes, without regard to their reasonableness or unreasonableness, "all kinds of those contracts which in fact restrain, or may restrain, trade."[14] In so deciding, the court did not follow the modern and well considered judgments in the state courts and in the courts of England. The doctrine of contracts in restraint of trade is not of recent discovery. Holmes, J.,[15] points out that contracts in restraint of trade, as defined by the common law, are contracts with a stranger to the contractor's business, and which wholly or partially restrain the freedom of the contractor in carrying on that business; and that combinations or conspiracies in restraint of trade, as defined by the common law, are arrangements to keep strangers to the agreement out of the business, and which tend to monopolize some portion of the trade of the country. Such contracts were originally held void at common law, because of the injury to the public, by its deprivation of the results of the restricted individual's industry, and because of the injury to the individual by his deprivation of the opportunity to labour for himself and for those who might be dependent upon him. Under the conditions of trade in the time of the Year Books any restraint of trade was an unlawful restraint, but under modern conditions the test of invalidity is the unreasonableness of the restraint, for, as Mr. Justice Peckham

[14] U. S. *v.* J. T. A., 171 U. S. 505.

[15] In his dissenting judgment in N. S. Co. *v.* U. S., 193 U. S. 197, 400.

said when he sat in the Court of Appeals of New York,[16] "An agreement would not," necessarily, "be in restraint of trade, although its direct effect might be to restrain to some extent the trade which had been done." The overwhelming current of authority supports this view. Brewer, J., in his concurring judgment in N. S. Co. *v.* U. S.[17] holds that while the court had rightly decided the prior cases under the statute, because the contracts in all those cases were, in his opinion, in unreasonable restraint of trade, yet, nevertheless, the statute was not intended, and should not be construed, to prohibit contracts in partial or reasonable restraint of trade.

3. If it were not for the judgment in N. S. Co. *v.* U. S.[18] it might be regarded as authoritatively determined, that "there must be some direct and immediate effect upon interstate commerce in order to come within the act."[19] Upon that principle all the cases, other than that of N. S. Co. *v.* U. S., can be reconciled.

4. A direct,[20] or indirect,[21] restraint of railway competition in interstate commerce is within the statute, which, although a general statute, repeals *pro tanto* by implication the Interstate Commerce Acts,[22] which forbid unjust and unreasonable charges by railway carriers, which require public notice of increases or reductions in rates, which forbid secret or preferential rates and which, therefore, prohibit effective railway competition.[23]

5. A state cannot, in respect of its ownership of public

[16] Matthew *v.* A. P. of N. Y., 136 N. Y. 333.

[17] 193 U. S. 357.

[18] 193 U. S. 197.

[19] Per Peckham, J., in Hopkins *v.* U. S., 171 U. S. 578, 592.

[20] U. S. *v.* T. M. F. A., 166 U. S. 290; U. S. *v.* J. T. A., 171 *id.* 505.

[21] N. S. Co. *v.* U. S., 193 U. S. 393.

[22] Act 4th February, 1887, 24 Stat. 379, c. 104, and its supplements, *supra,* Section 49.

[23] See the dissenting judgment of White, J., in U. S. *v.* T. M. F. A., 166 U. S. 357 *et seq.*

lands and its maintenance of public institutions, and the possibilities of depreciation in the value of such lands, and of increase in the cost of maintaining such institutions, by reason of the possibility of a diminution of competition between railways, sue in a federal court under the statute to enjoin the organization of a corporation to hold the majorities of the shares of such railways, for the possibility of such damage to the state is too remote and indirect and is not the direct actual injury contemplated by the statute.[24]

6. A combination illegally formed in violation of the statute is not precluded from recovering the purchase price of goods sold by it, nor can its vendee set off the threefold damages under the statute, for the liability therefor is only enforcible by a direct action.[25] Nevertheless, any one sued upon a contract may set up as a defence that that contract is a violation of the statute, and, if found to be so, that fact will constitute a good defence to the action.[26]

Logically, a combination of labour is as clearly subject to the statute as a combination of capital.[27] The labour unions reasonably restrain trade, when they combine to sell a certain minimum of labour for not less than a certain price, but they unreasonably restrain trade when, in order to effect their purpose, they use threats and force to prevent employers from securing labour not provided by members of the union. In the absence of an express and unfulfilled contract of service, it is the legal right of every man to refuse to work, but it is neither the legal nor

[24] Minnesota *v.* N. S. Co., 194 U. S. 48.

[25] Connolly *v.* U. S. P. Co., 184 U. S. 540.

[26] Bement *v.* N. H. Co., 186 U. S. 70, 88.

[27] *In re* Debs, 64 Fed. 724, 745, 755, 158 U. S. 564. See "The Law of Contracts in Restraint of Trade, with Special Reference to Trusts," by George Stuart Patterson, Esq.

the moral right of any man to hinder other men from working.

In each case decided under the statute the judgment of the court was based upon a construction of the agreement of combination, and upon a consideration of the possibilities of action thereunder, without any reference to that which the parties had done, or probably would do, thereunder.

The statute has been construed to forbid:

1. An agreement by several corporations organized under the laws of different states and engaged in the manufacture, interstate transportation, and sale of a commodity, to abstain from competition as between themselves within a designated territory, including more than one state.[28]

2. An agreement by members of an unincorporated association of manufacturers of, and dealers in, a commodity, doing business in several states not to sell to nonmembers save at a price in excess of that at which the members sell to each other.[29]

3. Agreements by competing railway corporations for the maintenance of uniform rates upon interstate traffic.[30]

4. A combination by several persons whereby a holding corporation is organized under the laws of a state to acquire and hold the majorities of the shares of two railways organized under the laws of other states and theretofore competing in interstate traffic,[31] the ground of decision being that the common corporate ownership of the

[28] A. P. & S. Co. *v.* U. S., 175 U. S. 211.

[29] Montague *v.* Lowry, 193 U. S. 38.

[30] U. S. *v.* T. M. F. A., 166 U. S. 290; Gray, Shiras, and White, JJ., dissented; U. S. *v.* J. T. A., 171 *id.* 505; Gray, Shiras and White, JJ., dissented, and McKenna, J., did not sit.

[31] N. S. Co. *v.* U. S. 193 U. S. 197; Harlan, Brown, McKenna, and Day, JJ., concurred in the judgment read by Harlan, J., and Brewer, J., concurred in the decree, but did not concur in all the reasoning of Harlan, J.; Fuller, C. J., and Peckham, White, and Holmes, JJ., dissented.

shares will prevent competition between those railways, and that the statute forbids the formation and operation by whatever means of a combination which possibly may prevent such competition.

On the other hand the statute has been construed not to forbid:

1. Exclusive licenses to manufacture and sell under patents for inventions, for a patent is necessarily a monopoly and a patentee's protection is valueless if he cannot fix prices and restrain competition.[32]

2. The organization of a corporation for the purchase, manufacture, and sale of a commodity throughout the United States and the acquisition and ownership by that corporation of all, save one, of the manufactories of that commodity in the United States,[33] the ground of decision being, not that the case as presented was simply that of a combination of factories, but that the case was that of the vesting in one agency the ownership of, and the control over, theretofore separated instrumentalities of interstate commerce; that the possible abstention of those instrumentalities from competition could only be regarded as incidental to the exercise of lawful rights of purchase, sale, and ownership; and that the combination, therefore, lacked that direct and immediate effect upon interstate commerce which there should be in order to bring it within the statute.

3. An agreement by local sellers upon commission fixing their rates of commission, regulating competition as between themselves, forbidding purchases from non-members, and forbidding the transaction of any business with suspended members.[34]

[32] Bement *v.* N. H. Co., 186 U. S. 70; Harlan, Gray, and White, JJ., did not sit in this case.

[33] U. S. *v.* E. C. Knight Co., 156 U. S. 1. Harlan, J., dissented.

[34] Hopkins *v.* U. S., 171 U. S. 578; Anderson *v.* U. S., *ibid.* 604. Harlan,

In deciding upon the possible effect of the agreements and acts of combination in the three railway cases[35] and in holding that they restrained trade because they checked competition, the court made the mistake of not properly appreciating the essential differences which distinguish competition between common carriers from competition between sellers of goods. A railway company, like all other common carriers, is bound to carry all freight that may be offered, to the extent of its facilities, at reasonable rates, and without unjust discrimination, either personal or local, and it is legally compellable to refund any overcharge in excess of that which shall be adjudged to be reasonable; and the Interstate Commerce Act[36] has made this rule of the common law obligatory upon all carriers engaged in interstate commerce. On the other hand, buyers of goods may lawfully buy at the lowest price and sellers of goods may lawfully sell at the highest price. In railway rates it is to the interest of the public that there should be uniformity, in order that all shippers may have equal advantages; stability, in order that all buyers and sellers may correctly estimate the cost of transportation as affecting market prices; and adequacy of compensation to the carrier, in order that the carrier may receive that which, in the words of the court,[37] "the services rendered are reasonably worth."

Before the enactment of the statute of 1890 the Interstate Commerce Act, as amended by the Act of 2d March,

J., dissented in both cases. In the first case it was held to be an immaterial circumstance that the local market was situated partly in one state and partly in another state. In the last case the facts differed only in that the parties to the agreement were purchasers of property upon their own account.

[35] U. S. *v.* T. M. F. A., U. S. *v.* J. T. A., and N. S. Co. *v.* U. S.

[36] 4th February, 1887, 24 Stat. 379, c. 104.

[37] Smyth *v.* Ames, 169 U. S. 466.

1889,[38] had forbidden an advance of railway rates, "except after ten days' public notice," and had permitted reductions in rates only "after three days' public notice." The Act of 19th February, 1903,[39] passed after the enactment of the statute of 1890, declared it to be a misdemeanor for any carrier subject to the Interstate Commerce acts to fail to obey those acts. Therefore, as well after as before the enactment of the Anti-trust statute, any real competition between railways was forbidden by legislation, for as a carrier can take no business away from a competitor by a reduction in an open rate, of which three days' public notice must be given, the only way to get business by reducing the rates is to give that reduction secretly to the customer whose traffic is to be secured. The Anti-trust statute, as construed by the court, says that railway competition must be unrestrained. The Interstate Commerce acts say that railways must not do those acts which are essential to any effective competition.

Uncontrolled competition in transportation inevitably produces evils which the country has often experienced. A war of railway rates necessarily forces a diminution of that liberality of railway expenditure which benefits the manufacturer, the dealer, and the labouring man. Such a war may result also in the bankruptcy of weaker companies, in costly receiverships, and reorganizations, and in absorption by stronger rivals. When competition is unrestrained the power of fixing rates is necessarily vested in the company which receives the goods from the shipper, and that power is inevitably delegated to irresponsible subordinates, to whom their road's need of business is all-important. From this it follows, that not only do the carriers fail to receive under such conditions

[38] 25 Stat. 855.
[39] 32 Stat. 847.

the advantages of adequate compensation, but also the shippers and the public lose the benefits of uniformity and stability of rates. Uncontrolled competition, therefore, injures, instead of benefits, the public interest. While some judges have been captivated by the supposed advantages of unrestricted competition among carriers, other and equally eminent judges, and as competent observers, have detected the fallacy in the reasoning, and have pointed out the danger.[40] There are limits to legislation. Acts of Congress cannot control either the laws of nature or the laws of trade. As the statute, judicially construed, forbids treaties of peace between warring lines and consolidations of conflicting railway interests, some other way will be found, in the interest of the public, to accomplish the desired result.

It is difficult to reconcile the case of N. S. Co. *v.* U. S.[41] with the case of U. S. *v.* E. C. Knight Co.[42] Obviously a statutory prohibition of "every" restraint of trade cannot be so construed as to permit mercantile, and forbid transportation, restraints of trade. In each of those cases the controlling fact is that there is vested in one agency the ownership of, and control over, instrumentalities of interstate commerce, and, if there be a resultant restraint of trade, that result follows, not because of any agreement to abstain from competition, but only because such abstention may possibly follow the exercise of legal rights of purchase, sale and ownership.[43]

The result in N. S. Co. *v.* U. S.[44] seems to be open to two further objections, which do not appear to be met by

[40] Hare *v.* L. & N. R., 2 J. & H. Ch. 80, 103; M. & L. R. *v.* C. R., 66 N. H. 100. See Report XIV of the Interstate Commerce Commission.

[41] 193 U. S. 197.

[42] 156 U. S. 1.

[43] See the view of Holmes, J., 193 U. S. 405.

[44] 193 U. S. 197.

anything in the judgment of the court, as read by Harlan, J., or in the concurring judgment of Brewer, J.

1. The act, as construed in the T. M. F. A. and J. T. A. cases, forbids railways to agree not to compete, but it does not forbid non-competition in the absence of agreement. As well after as before the act, railways were, and are, bound in law to carry all passengers and freight that may be offered, to the extent of their facilities, at reasonable rates, and without unjust discrimination, either personal or local; and if the managers of any railway, while observing those requirements, charge the same rates as are charged by other railways under like conditions, but without entering into any agreement to that effect, they violate no law. If it be not unlawful for two railway companies owned by different shareholders to abstain from competition, it cannot be unlawful for two railway companies owned by one body of shareholders to similarly abstain. The fact of common ownership, therefore, is not in itself a restraint of trade, nor does it give rise to a presumption that any restraint of trade will be committed. How can it then be unlawful to organize a holding company to acquire the shares of two operating companies?

If it be said that the organization of the holding corporation is only a means to the end of so unifying the management of the operating companies as to prevent any possibility of competition as between those companies and that the organization is therefore a fraud upon the statute, the answer is that which the court, speaking by Mr. Justice Hunt, gave[45] in a case where the question was as to the validity of that which was alleged to be a device to avoid the payment of a stamp duty; for in that case the court said "if the device is carried out by the means of legal forms, it is subject to no legal censure."

[45] U. S. *v.* Isham, 17 Wall. 506.

2. In the case, there is neither contract, combination, nor conspiracy between the operating companies, but there is an organization of a holding company by shareholders of the operating companies, and, by force of that organization, the holding company becomes the majority shareholder of both operating companies. While the rights of the shareholders of a corporation entitle them to elect its directors, and to participate in net profits, when declared, and, upon dissolution, in net assets, those rights, nevertheless, do not give any power of direct corporate management. A corporation is a legal entity distinguishable from the body of its shareholders. It can act only by its officers and agents, and its shareholders are neither its officers nor agents. An agreement signed by every shareholder will not bind the corporation. If an express agreement of shareholders of the operating companies be not effective, how can effect be given to a sale and transfer of shares as legal evidence of presumptive corporate action?

Telegraphs.

54. Congress has authorized [46] any telegraph company organized under the laws of any state "to construct, maintain, and operate lines of telegraph through and over any portion of the public domain of the United States, over and along any of the military or post roads [47] of the United States which have been or may hereafter be declared such by act of Congress, and over, under, or across, the navigable streams or waters of the United States" upon certain conditions, including priority to government messages, a reservation of the privilege of

[46] Act of 24th July, 1866, 14 Stat. 221; Rev. Stat. 5263, etc.

[47] Congress, by Act of 8th June, 1872, c. 335, 17 Stat. 308; Rev. Stat. 3964, declared all railway lines in the United States to be post roads.

purchase by the government, and the written acceptance by the company of the restrictions and obligation of the act.[48] Under this legislation it has been decided that a state may require telegraph companies to receive on payment of their charges messages to be transmitted to points in other states, and to deliver messages with due diligence.[49] A state may require a telegraph company doing interstate business to pay to the municipality a rental for the use of public highways by its poles.[50] A state may tax the property owned by a telegraph company within the state.[51] A state may require from a telegraph company payment of a license tax on business done within the state by the company, though it also carries on an interstate business.[52]

A state may not, as against the privileges conferred by the United States,[53] vest an exclusive monopoly in one telegraph company.[54] A state may not tax messages sent to points without the state, nor messages sent by officers of the United States on public business.[55] A state may not, as affecting delivery in other states of messages from points within the state, require delivery by special messengers.[56] A state may not require a license for the

[48] This act does not apply to telephone companies: Richmond *v.* S. B. T. Co., 174 U. S. 761.

[49] W. U. T. Co. *v.* James, 162 U. S. 650.

[50] St. Louis *v.* W. U. T. Co., 148 U. S. 92; P. T. C. Co. *v.* Baltimore, 156 *id.* 210. See also W. U. T. Co. *v.* New Hope, 187 *id.* 419; but *cf.* A. & P. T. Co. *v.* Philadelphia, 190 *id.* 160; P. T. C. Co. *v.* New Hope, 192 *id.* 55; P. T. C. Co. *v.* Taylor, *ibid.* 64.

[51] Massachusetts *v.* W. U. T. Co., 141 U. S. 40; P. T. Co. *v.* Adams, 155 *ia.* 688; W. U. T. Co. *v.* Taggart, 163 *id.* 1; W. U. T. Co. *v.* Missouri, 190 *id.* 412.

[52] Ratterman *v.* W. U. T. Co., 127 U. S. 411; P. T. C. Co. *v.* Charleston, 153 *id.* 692.

[53] Rev. Stat., sec. 5263, etc.

[54] P. T. Co. *v.* W. U. T. Co., 96 U. S. 1.

[55] W. U. T. Co. *v.* Texas, 105 U. S. 460.

[56] W. U. T. Co. *v.* Pendleton, 122 U. S. 347.

privilege of doing interstate business.[57] A state may not prohibit, until all state taxes have been paid by it, the doing of business by a corporation which has accepted the privileges granted by the act of Congress.[58]

Commerce with the Indian tribes.

55. The Indian tribes are not foreign but domestic and dependent nations; their relation to the United States resembles that of a ward to his guardian; and they are completely under the sovereignty and dominion of the United States. They, therefore, cannot sue in the courts of the United States as foreign states.[59] The regulation of the relation between the several states and the Indian tribes is exclusively vested in the United States, and state laws cannot operate within an Indian reservation.[60] Congress, under the power to regulate commerce with the Indian tribes, may grant to a railroad corporation a right of way through their lands.[61] It may also forbid the sale of spirituous liquors to all persons belonging to Indian tribes within the territorial limits of a state, even outside the bounds of an Indian reservation,[62] and it is competent for the United States, in the exercise of the treaty-making power, to stipulate in a treaty with an Indian tribe, that the introduction and sale of spirituous liquors shall be prohibited within certain territories ceded by the tribe to the United States, and such stipulation operates *proprio vigore,* and is binding though the ceded

[57] Leloup *v.* Port of Mobile, 127 U. S. 640 (overruling Osborne *v.* Mobile, 16 Wall. 479); W. U. T. Co. *v.* Alabama, 132 U. S. 472.

[58] W. U. T. Co. *v.* Massachusetts, 125 U. S. 530.

[59] Cherokee Nation *v.* Georgia, 5 Pet. 1; Worcester *v.* Georgia, 6 *id.* 515; Cherokee Nation *v.* S. K. Ry., 135 U. S. 641.

[60] Worcester *v.* Georgia, 6 Pet. 515.

[61] Cherokee Nation *v.* S. K. Ry., 135 U. S. 641.

[62] U. S. *v.* Holliday; U. S. *v.* Haas, 3 Wall. 407.

territory be within the limits of an organized county of one of the United States.[63]

[63] U. S. *v.* Forty-three Gallons of Whiskey, 93 U. S. 188. As to the term "Indian country," see *Ex parte* Crow Dog, 109 U. S. 556; U. S. *v.* Le Bris, 121 *id.* 278. The subject of the exercise by the states of their powers of taxation, and of police regulation, as affecting commerce, is more fully treated in other chapters of this book.

CHAPTER V.

THE IMPAIRMENT OF THE OBLIGATION OF CONTRACTS.

56. The prohibition affects only state laws.
57. The term "law" defined.
58. Judgments of state courts not conclusive either as to the non-existence or non-impairment of contracts.
59. The obligation of a contract defined.
60. Legislation as to remedies.
61. The term "contracts" defined.
62. State insolvent laws.
63. Judgments as contracts.
64. Municipal taxation.
65. History of the prohibition.
66. State grants.
67. Express contracts of exemption from taxation.
68. Express grants of peculiar privileges.
69. Contracts between a state and its political subdivisions.
70. Implied contracts in charters of incorporation.
71. Implied corporate exemption from taxation.
72. Implied grants of peculiar privileges.
73. Exemption from the operation of the police power.
74. Contracts as to matters of public concern.
75. The withdrawal by a state of its consent to be sued.
76. The force and effect of the prohibition as construed by the Supreme Court.

The prohibition affects only state laws.

56. Section 10 of Article I of the Constitution declares that "no state shall . . . pass any . . . law impairing the obligation of contracts." This prohibition does not in terms affect the exercise of legislative power by the government of the United States, and not only is there not in the Constitution any similar prohibition with regard to the United States, but by the grant of power to Congress, "to establish . . . uniform laws on the subject of bankruptcies throughout the United States,"[1] authority is ex-

[1] Article I, Section 9.

pressly conferred to impair the obligation of contracts between debtors and creditors;[2] and under the doctrine of the implied powers, as construed by the court, Congress may impair the obligation of contracts by authorizing the issue of notes which shall be a legal tender in satisfaction of antecedently contracted debts.[3] The constitutional prohibition is likewise inoperative with regard to the acts of any political organization which at the time of the adoption of the act in question is not one of the United States; thus, the Constitution having, under the resolution of the Convention of 1787 and the Act of Congress of February, 1788, gone into effect on the first Wednesday of March, 1789, a statute enacted by the state of Virginia in 1788 was not affected by the constitutional prohibition.[4] So, also, a statute enacted by the republic of Texas before its admission into the United States as the state of Texas could not be held to be void for repugnancy to this clause of the Constitution.[5]

The term "law" defined.

57. The prohibition of the passage by a state of any "law impairing the obligation of contracts," would, if strictly construed, include under the word "law" only statutes enacted by state legislatures, but it has been determined that the word "law" comprehends, in addition to acts of legislation, state constitutions and constitutional amendments;[6] judicial decisions of state courts of last

[2] Sturges *v.* Crowninshield, 4 Wheat. 122, 194. See also Hanover Nat. Bank *v.* Moyses, 186 U. S. 181, 188; 30 Stat. 544, c. 541; 32 Stat. 797, c. 487.

[3] *Supra*, Chap. II.

[4] Owings *v.* Speed, 5 Wheat. 420.

[5] League *v.* De Young, 11 How. 185, 203. See also Scott *v.* Jones, 5 How. 343, 378.

[6] R. Co. *v.* McClure, 10 Wall. 511; White *v.* Hart, 13 *id.* 646; Gunn *v.* Barry, 15 *id.* 610; County of Moultrie *v.* Rockingham T. C. S. Bank, 92 U. S. 631; Edwards *v.* Kearzey, 96 *id.* 595; Keith *v.* Clark, 97 *id.* 454; N. O. G. Co. *v.* L. L. Co., 115 *id.* 650; Fisk *v.* Jefferson Police Jury,

resort, rendered subsequently to the making of the contract in question, and antecedently to the suit in which the court determines the invalidity of the contract, and altering by construction the constitution and statutes of the state in force when the contract was made;[7] and, in general, any act or order, from whatever source emanating, to which a state, by its enforcement thereof, gives the force of a law; as, for instance, a by-law or ordinance of a municipal corporation,[8] or a statute enacted by the congress of the Confederacy, and enforced during the war of the rebellion by a court of a state within the insurgent lines.[9] Obviously the law, which is alleged to have impaired the obligation of the contract must have been enacted subsequently to the making of the contract, for a law enacted antecedently to the making of the contract can be said to have entered into, and become part of, the contract.[10] The judgment of the state court in the cause,

116 *id.* 131; Shreveport *v.* Cole, 129 *id.* 36; Bier *v.* McGehee, 148 *id.* 137; Hanford *v.* Davies, 163 *id.* 273; H. & T. C. Ry. *v.* Texas, 170 *id.* 243.

[7] Gelpcke *v.* Dubuque, 1 Wall. 175; Havemeyer *v.* Iowa County, 3 *id.* 294; Chicago *v.* Sheldon, 9 *id.* 50; The City *v.* Lamson, *ibid.* 477; Olcott *v.* The Supervisors, 16 *id.* 678; Douglass *v.* County of Pike, 101 U. S. 677; County of Ralls *v.* Douglass, 105 *id.* 728; Pleasant Township *v.* A. L. I. Co., 138 *id.* 67; Loeb *v.* Columbia Township Trustees, 179 *id.* 472, 492; Wilkes County *v.* Coler, 180 *id.* 506. This doctrine was first suggested by Taney, C. J., who said, in O. L. I. & T. Co. *v.* Debolt, 16 How. 432: "The sound and true rule is, that if the contract when made was valid by the laws of the state, as then expounded by all the departments of its government and administered in its courts of justice, its validity and obligation cannot be impaired by any subsequent act of the legislature of the state or decision of its courts, altering the construction of the law;" and in Gelpcke *v.* Dubuque, 1 Wall. 206, Swayne, J., quoted the dictum of Taney, C. J., and declared it to be "the law of this court."

[8] Walla Walla *v.* W. W. W. Co., 172 U. S. 1; St. P. G. L. Co. *v.* St. Paul, 181 *id.* 142; Detroit *v.* D. C. S. R., 184 *id.* 368.

[9] Williams *v.* Bruffy, 96 U. S. 176; Ford *v.* Surget, 97 *id.* 594; Stevens *v.* Griffith, 111 *id.* 48.

[10] L. W. Co. *v.* Easton, 121 U. S. 388, 391; Denny *v.* Bennett, 128 *id.* 489; Lake County *v.* Rollins, 130 *id.* 662; Pleasant Township *v.* A. L. I. Co., 138 *id.* 67; Brown *v.* Smart, 145 *id.* 454; Bier *v.* McGehee, 148

determining the particular contract to be invalid, cannot be said to be a law impairing the obligation of the contract, for otherwise the federal court of last resort would be called upon to "re-examine the judgments of the state courts in every case involving the enforcement of contracts." As Harlan, J., said, in L. W. Co. *v.* Easton,[11] "The state court may erroneously determine questions arising under a contract, which constitute the basis of the suit before it; it may hold a contract to be void, which, in our opinion, is valid; it may adjudge a contract to be valid, which, in our opinion, is void; or its interpretation of the contract may, in our opinion, be radically wrong; but, in neither of such cases, would the judgment be reviewable by this court under the clause of the Constitution protecting the obligation of contracts against impairment by state legislation, and under the existing statutes defining and regulating its jurisdiction, unless that judgment in terms, or by its necessary operation, gives effect to some provision of the state constitution, or some legislative enactment of the state, which is claimed by the unsuccessful party to impair the obligation of the particular contract in question."[12] It must, therefore, appear in

id. 137; P. I. Co. *v.* Tennessee, 161 *id.* 193; G. & S. I. R. *v.* Hewes, 183 *id.* 66; Pinney *v.* Nelson, *ibid.* 144; D. G. Co. *v.* U. S. G. Co., 187 *id.* 611; O. W. Co. *v.* Oshkosh, 187 *id.* 437; Blackstone *v.* Miller, 188 *id.* 189. See also C., M. & St. P. Ry. *v.* Solan, 169 *id.* 133; K. W. Co. *v.* Knoxville, 189 *id.* 434.

[11] 121 U. S. 388, 392.

[12] See also R. Co. *v.* Rock, 4 Wall. 177, 181; R. Co. *v.* McClure, 10 *id.* 511, 515; Knox *v.* Exchange Bank, 12 *id.* 379, 383; Delmas *v.* Ins. Co., 14 *id.* 661, 665; University *v.* People, 99 U. S. 309, 319; C. L. I. Co. *v.* Needles, 113 *id.* 574; N. O. W. W. *v.* L. S. Co., 125 *id.* 18; Kreiger *v.* Shelby R., *ibid.* 39; H. Bridge Co. *v.* Henderson City, 141 *id.* 679; St. P., M. & M. Ry. *v.* Todd County, 142 *id.* 282; Missouri *v.* Harris, 144 *id.* 210; Wood *v.* Brady, 150 *id.* 18; C. L. Co. *v.* Laidley, 159 *id.* 103; Hanford *v.* Davies, 163 *id.* 273; Turner *v.* Wilkes County Comrs., 173 *id.* 461; Wilkes County *v.* Coler, 180 *id.* 506; G. & S. I. R. *v.* Hewes, 183 *id.* 66; N. O. W. Co. *v.* Louisiana, 185 *id.* 336; N. M. B. & L. Assn. *v.* Brahan, 193 *id.* 635.

any cause in which it is sought to reverse in the Supreme Court of the United States, a decree or judgment of a state court for contravention of the constitutional prohibition of the impairment of contracts, that in the particular case the state court enforced to the prejudice of the plaintiff in error some act of state, either in the form of a state constitution, or an act of the state legislature, or a judgment of a court in another case, or an act of an extrinsic authority to which the state by its adoption thereof gave the force of law, and that the act of state, whatever its form, was, as affecting the contract, put into operation subsequently to the making of the contract.

Judgments of state courts not conclusive either as to the non-existence or non-impairment of contracts.

58. In questions under this clause of the Constitution the courts of the United States do not accept as conclusive upon them the judgment of the state court either as to the non-existence of contracts or as to their non-impairment,[13] for, if the decision of the state court were to be accepted without inquiry or examination, the constitutional prohibition would be nugatory.

[13] State Bank *v.* Knopp, 16 How. 369; O. L. I. & T. Co. *v.* Debolt, *ibid.* 416; Jefferson Branch Bank *v.* Skelly, 1 Bl. 436; Bridge Proprietors *v.* Hoboken Co., 1 Wall. 116; Delmas *v.* Ins. Co., 14 *id.* 661; Wright *v.* Nagle, 101 U. S. 791; Williams *v.* Louisiana, 103 *id.* 637; L. & N. R. *v.* Palmes, 109 *id.* 244; Pleasant Township *v.* A. L. I. Co., 138 *id.* 67; Bryan *v.* Board of Education, 151 *id.* 639; M. & O. R. *v.* Tennessee, 153 *id.* 486; Shelby County *v.* Union & Planters' Bank, 161 *id.* 149; Woodruff *v.* Mississippi, 162 *id.* 291; Douglas *v.* Kentucky, 168 *id.* 488; C., B. & Q. R. *v.* Nebraska, 170 *id.* 57; McCullough *v.* Virginia, 172 *id.* 102; Walsh *v.* C., H. V. & A. R., 176 *id.* 469; I. C. R. *v.* Chicago, *ibid.* 646; H. & T. C. R. *v.* Texas, 177 *id.* 66; Stearns *v.* Minnesota, 179 *id.* 223; Board of Liquidation *v.* Louisiana, *ibid.* 622; F. W. Co. *v.* Freeport City, 180 *id.* 587; St. P. G. L. Co. *v.* St. Paul, 181 *id.* 142; Wilson *v.* Standefer, 184 *id.* 399; *cf.* Wagonner *v.* Flack, 188 *id.* 595.

The obligation of a contract defined.

59. The obligation of a contract is the duty of performance which the law imposes on one, or other, or both, of the parties to the contract.[14] As Marshall, C. J., said in the case cited, "Any law which releases a part of this obligation must in the literal sense of the word impair it." The application of the constitutional prohibition is not dependent on the extent of the impairment of vested rights.[15]

Legislation as to remedies.

60. A state may, without impairment of the obligation of a contract, regulate, or even limit, the remedies for the enforcement of that contract, provided that it does not take away all remedies therefor, and that it leaves in force a substantial remedy.[16] Thus a state may, in the case of a corporation whose charter requires that service of process on the corporation shall be made only at its principal office, provide by subsequent legislation that such process may be served on any officer, clerk, or agent of the corporation.[17] A state may abolish imprisonment for

[14] Sturges *v.* Crowninshield, 4 Wheat. 197. See also Bedford *v.* E. B. & L. Assn., 181 U. S. 227, 241.

[15] Green *v.* Biddle, 8 Wheat. 1. But where a charter authorizing the consolidation of railways was modified by a statute prohibiting the consolidation of competing roads before such consolidation had been attempted, the court said: "Where the charter authorizes the company in sweeping terms to do certain things which are unnecessary to the main object of the grant, and not directly and immediately within the contemplation of the parties thereto, the power so conferred, so long as it is unexecuted, is within the control of the legislature and may be treated as a license, and may be revoked, if a possible exercise of such power is found to conflict with the interests of the public." "We cannot recognize a vested right to do a manifest wrong:" Pearsall *v.* G. N. Ry., 161 U. S. 646, 673, 675. See also A. Ry. *v.* New York, 176 *id.* 335, 345.

[16] And it may, of course, grant an additional remedy: N. O. C. & L. R. *v.* New Orleans, 157 U. S. 219; Wagonner *v.* Flack, 188 *id.* 595. See also Wilson *v.* Standefer, 184 *id.* 399.

[17] R. Co. *v.* Hecht, 95 U. S. 168; C. M. L. I. Co. *v.* Spratley, 172 *id.* 602.

debt as a remedy for breach of contract;[18] it may validate technically defective mortgages,[19] or conveyances by femes covert;[20] it may by statute grant new trials and create new tribunals to set aside grants or reverse judgments alleged to be fraudulent;[21] it may provide speedy and equitable methods for determining the title to lands under patents granted by the state;[22] it may authorize at the request of all parties in interest the discharge of testamentary trustees of real estate;[23] it may change the rate of interest to be paid to the purchaser in the case of the redemption of mortgaged premises sold under foreclosure;[24] it may repeal usury laws which unrepealed would have avoided the contract;[25] it may prescribe a scheme for the reorganization of an embarrassed corporation and provide that creditors who have notice of, and do not dissent from, the scheme shall be bound thereby;[26] it may reduce the limitation of time for bringing suit provided that a reasonable limit elapses after the enactment before the limitation bars a suit upon existing contracts;[27] it may require registration as a prerequisite to the legal enforcement of existing mortgages, provided that a reasonable period be allowed before the law goes into effect;[28] it may require holders of tax sale certificates to give notice to the occupant of the land, if any there be,

[18] Mason *v.* Haile, 12 Wheat. 370; Penniman's Case, 103 U. S. 714.
[19] Gross *v.* U. S. Mtge. Co., 108 U. S. 477.
[20] Randall *v.* Kreiger, 23 Wall. 137.
[21] League *v.* De Young, 11 How. 185.
[22] Jackson *v.* Lamphire, 3 Pet. 280.
[23] Williamson *v.* Suydam, 6 Wall. 723.
[24] C. M. L. I. Co. *v.* Cushman, 108 U. S. 51; Hooker *v.* Burr, 194 *id.* 415.
[25] Ewell *v.* Daggs, 108 U. S. 143.
[26] Gilfillan *v.* U. C. Co., 109 U. S. 401.
[27] Terry *v.* Anderson, 95 U. S. 628; Barrett *v.* Holmes, 102 *id.* 651; Koshkonong *v.* Burton, 104 *id.* 668; *In re* Brown, 135 *id.* 701; Wheeler *v.* Jackson, 137 *id.* 245. See also Wilson *v.* Iseminger, 185 *id.* 55; O. W. Co. *v.* Oshkosh, 187 *id.* 437.
[28] Vance *v.* Vance, 108 U. S. 514.

before taking a tax deed;[29] it may require registration with municipal officials of judgments against a municipality;[30] it may provide that a city shall not be sued until the claim has been presented to the city council and disallowed by it, and that, thereupon, an appeal to court, if made, shall be made within a limited time;[31] it may free shareholders of a corporation from individual liability for debts of the corporation to an amount greater than their shares, for such legislation does not impair the direct liability of the corporation;[32] it may, after a state bank has obtained judgment against a party, authorize that party to set off against the judgment circulating notes of the bank procured by him after the entry of the judgment;[33] it may, after judgment has been obtained, reduce the rate of interest thereafter to accrue on that judgment;[34] and, a disseised tenant for years being entitled to sue on the landlord's covenant for quiet possession and also on a statutory remedy for forcible entry and detainer, the state may take away the statutory remedy, provided that the action on the covenant be left unimpaired.[35] A state, having issued bonds, and having by a subsequent statute provided for the funding of those bonds on certain terms at a reduced rate of interest, may, by a later statute, prohibit the funding of a specified class of those bonds until by judicial decree their validity shall have been determined, for the original remedy of the bondholder is not thereby impaired.[36] So also, a state, which has contracted to receive its taxes in the notes of a certain bank,

[29] Curtis *v.* Whitney, 13 Wall. 68.
[30] Louisiana *v.* New Orleans, 102 U. S. 203.
[31] O. W. Co. *v.* Oshkosh, 187 U. S. 437.
[32] Ochiltree *v.* R. Co., 21 Wall. 249.
[33] Blount *v.* Windley, 95 U. S. 173.
[34] Morley *v.* L. S. & M. S. Ry., 146 U. S. 162.
[35] Drehman *v.* Stifle, 8 Wall. 595.
[36] Guarantee Co. *v.* Board of Liquidation, 105 U. S. 622.

may, by statute, provide that the only remedy for taxpayers whose tender of such notes may be refused shall be to pay in legal money and within a time limited to bring suit against the tax collector, judgment against whom shall be a preferred claim against the state.[37] So also where the laws of a state permit coupons of state bonds to be received in payment of state taxes, provided that in case of the refusal of such coupons when tendered the holder thereof might enforce his rights under the contract by suing out an alternative *mandamus* against the officer refusing the coupons, and if judgment should be rendered in favour of the holder of the coupons that he could then have forthwith a peremptory writ of *mandamus* for the recovery of damages and costs, the obligation of the contract was not impaired by a subsequent statute which required, in case of the refusal of the tender of the coupons, a payment of the state taxes in lawful money, and a lodging of the coupons in a state court of competent jurisdiction, and the subsequent framing of an issue to determine whether or not the coupons were genuine and legally receivable for taxes, with a right of appeal to the state court of last resort.[38]

On the other hand, a state, in acting upon the remedy, cannot take away all, or a substantial part, of the power for the enforcement of a contract. It, therefore, cannot forbid its courts to entertain jurisdiction of a suit to enforce, or obtain damages for the breach of, a class of contracts legally valid when made;[39] nor can a state forbid its courts, after the abolition of slavery, to take jurisdiction of actions upon contracts made before that abolition and the consideration for which was the price

[37] Tennessee *v.* Sneed, 96 U. S. 69.

[38] Antoni *v.* Greenhow, 107 U. S. 769; Moore *v.* Greenhow, 114 *id.* 338.

[39] Van Hoffman *v.* Quincy, 4 Wall. 552.

of slaves;[40] nor could a state, after the restoration of peace, declare void a contract made between its citizens during the war of the rebellion stipulating for payment in confederate notes;[41] nor can a state, after the making of a contract, change to the prejudice of either party the measure of damages for its breach;[42] nor can a state, by subsequent legislation, impose as a condition precedent to the legal enforcement of a contractual right, that he who seeks to enforce that right shall prove an extrinsic and independent fact that has no necessary connection with the right to be enforced, as, for instance, that he never bore arms in support of, or never aided, the rebellion against the United States;[43] or that he has paid certain taxes; nor can it permit the defendant to set off damages not caused by the plaintiff, as, for instance, the defendant's loss of property resulting from the war of the rebellion;[44] nor can a state, after a judgment has been enrolled, materially increase the debtor's exemption;[45] nor can a state after the making of a mortgage enlarge the period of time allowed for the redemption after foreclosure;[46] nor forbid a sale in foreclosure at which less than two-thirds of the value of the mortgaged premises as fixed by appraisement shall be realized;[47] nor take away the right to compound interest, if given by the law existing at the time of the making of the contract;[48] nor

[40] White *v.* Hart, 13 Wall. 646.

[41] Delmas *v.* Insurance Co., 14 Wall. 661.

[42] Effinger *v.* Kenney, 115 U. S. 566; W. & W. R. *v.* King, 91 *id.* 3.

[43] Pierce *v.* Carskadon, 16 Wall. 234.

[44] Walker *v.* Whitehead, 16 Wall. 314.

[45] Gunn *v.* Barry, 15 Wall. 610.

[46] Barnitz *v.* Beverly, 163 U. S. 118. See also Bradley *v.* Lightcap, 195 *id.* 1; *cf.* Hooker *v.* Burr, 194 *id.* 415.

[47] Bronson *v.* Kinzie, 1 How. 311; McCracken *v.* Hayward, 2 *id.* 608; Gantly *v.* Ewing, 3 *id.* 707.

[48] Koshkonong *v.* Burton, 104 U. S. 668; *cf.* Morley *v.* L. S. & M. S. Ry., 146 *id.* 162.

repeal a statute in force at the time of making the contract which renders the stock of a shareholder liable for the debts of the corporation;[49] nor materially change the rules of evidence which were in existence when the contract was made.[50]

The term "contracts" defined.

61. The term "contracts," as used in the constitutional prohibition, includes both executory and executed contracts,[51] comprehending, within the former class, promissory notes and bills of exchange,[52] corporate bonds,[53]

[49] Hawthorne *v.* Calef, 2 Wall. 10.

[50] Bryan *v.* Virginia, 135 U. S. 685.

[51] "Contract" is, as Field, J., said in Louisiana *v.* Mayor of New Orleans, 109 U. S. 285, 288, "used in the Constitution in its ordinary sense as signifying the agreement of two or more minds for consideration proceeding from one to the other to do or not to do certain acts." In Sturges *v.* Crowninshield, 4 Wheat. 122, 197, Marshall, C. J., said: "A contract is an agreement in which a party undertakes to do or not to do a particular thing." Marshall, C. J., said, in Fletcher *v.* Peck, 6 Cr. 87, 136: "A contract is a compact between two or more parties, and is either executory or executed. An executory contract is one in which a party binds himself to do, or not to do, a particular thing. . . . A contract executed is one in which the object of contract is performed, and this, says Blackstone, differs in nothing from a grant. . . . Since then, in fact, a grant is a contract executed, the obligation of which still continues, and since the Constitution uses the general term 'contracts,' without distinguishing between those which are executory and those which are executed, it must be construed to comprehend the latter as well as the former." In Dartmouth College *v.* Woodward, 4 Wheat. 629, Marshall, C. J., said: "The provision of the Constitution never has been understood to embrace other contracts than those which respect property or some object of value and confer rights which may be asserted in a court of justice." Daniel, J., said, in Butler *v.* Pennsylvania, 10 How. 402, 416: "The contracts designed to be protected . . . are contracts by which perfect, certain, definite, fixed, private rights of property are vested."

[52] Sturges *v.* Crowninshield, 4 Wheat. 122; McMillan *v.* McNeill, *ibid.* 209; Farmers & Mechanics' Bank *v.* Smith, 6 *id.* 131; Ogden *v.* Saunders, 12 *id.* 213; Boyle *v.* Zacharie, 6 Pet. 635; Suydam *v.* Broadnax, 14 *id.* 67; Cook *v.* Moffat, 5 How. 295; Baldwin *v.* Hale, 1 Wall. 223.

[53] State Tax on Foreign-held Bonds Case, 15 Wall. 300.

municipal bonds,[54] and municipal contracts for the payment of the salaries of their employes [55] and, generally, all legally enforcible contracts to do, or not to do, any particular act; and, within the latter class, grants and judgments founded upon contracts,[56] but not judgments founded upon torts; [57] nor is marriage a contract which may not be impaired by divorce legislation.[58]

There can be no impairment of the obligation of a contract which has not been legally made.[59] Thus a vote of the majority of the qualified voters of a county at an election held under a statute incorporating a railway and authorizing an issue of the bonds of the county in payment for the stock of the railway, if the qualified voters so decide it, does not constitute a contract whose obligation would be impaired by an amendment of the state

[54] County of Moultrie *v.* Rockingham T. C. S. Bank, 92 U. S. 631; Mobile *v.* Watson, 116 *id.* 289. But see Meriwether *v.* Garrett, 102 *id.* 472.

[55] Fisk *v.* Jefferson Police Jury, 116 U. S. 131.

[56] Blount *v.* Windley, 95 U. S. 173; Memphis *v.* U. S., 97 *id.* 293; Wolff *v.* New Orleans, 103 *id.* 358; Louisiana *v.* Pilsbury, 105 *id.* 278; Ralls County Court *v.* U. S., *ibid.* 733; Nelson *v.* St. Martin's Parish, 111 *id.* 716; Mobile *v.* Watson, 116 *id.* 289; *cf.* Morley *v.* L. S. & M. S. Ry., 146 *id.* 162.

[57] Louisiana *v.* New Orleans, 109 U. S. 285; Freeland *v.* Williams, 131 *id.* 405.

[58] Hunt *v.* Hunt, 131 U. S. clxv; Maynard *v.* Hill, 125 *id.* 190.

[59] Aspinwall *v.* Daviess County, 22 How. 364; Morgan *v.* Louisiana, 93 U. S. 217; Wadsworth *v.* Supervisors, 102 *id.* 534; Norton *v.* Board of Comrs. of Brownsville, 129 *id.* 479; Lake County *v.* Rollins, 130 *id.* 662; Lake County *v.* Graham, *ibid.* 674; Campbell *v.* Wade, 132 *id.* 34; Pleasant Township *v.* A. L. I. Co., 138 *id.* 67; New Orleans *v.* N. O. W. W., 142 *id.* 79; H. G. L. Co. *v.* Hamilton City, 146 *id.* 258; I. C. R. *v.* Illinois, *ibid.* 387; Bier *v.* McGehee, 148 *id.* 137; Citizens' S. & L. Assn., *v.* Perry County, 156 *id.* 692; Woodruff *v.* Mississippi, 162 *id.* 291; C. M. L. I. Co. *v.* Spratley, 172 *id.* 602; Los Angeles *v.* L. A. W. Co., 177 *id.* 558; Weber *v.* Rogan, 188 *id.* 10; Zane *v.* Hamilton County, 189 *id.* 370; U. R. *v.* City of New York, 193 *id.* 416; *cf.* C., M. & St. P. Ry. *v.* Solan, 169 *id.* 133; Gunnison County Comrs. *v.* Rollins, 173 *id.* 255; H. & T. C. R. *v.* Texas, 177 *id.* 66; Waite *v.* Santa Cruz, 184 *id.* 302; Tulare Irr. Dist. *v.* Shepard, 185 *id.* 1.

constitution,[60] or by a repeal of the statute,[61] before the subscription be made or the bonds issued. So, also, bonds which are fraudulently put into circulation by a state treasurer after they have been declared void by the state constitution cannot impose any liability upon the state.[62] And a contract which is void because its execution is beyond the powers of the municipality [63] or county [64] attempting its execution cannot irrevocably bind the municipality or county. Moreover a state cannot enter into an irrepealable contract by a conveyance of property in disregard of a public trust under which it is bound to hold and manage that property, as in the case of a conveyance of soil under navigable waters.[65] On the same principle, a state statute which is void by reason of repugnancy to the Constitution of the United States cannot constitute a contract of exemption from state taxation; as, for instance, a statute imposing taxation on national banks to an extent not permitted by the National Banking Act, and, therefore, a subsequent state statute imposing on national banks a taxation which, though a heavier burden than that imposed by the earlier statute, is yet within the limits

[60] Aspinwall *v.* Daviess County, 22 How. 364.

[61] Wadsworth *v.* Supervisors, 102 U. S. 534; *cf.* Campbell *v.* Wade, 132 *id.* 34.

[62] Bier *v.* McGehee, 148 U. S. 137.

[63] Norton *v.* Board of Comrs. of Brownsville, 129 U. S. 479; Pleasant Township *v.* A. L. I. Co., 138 *id.* 67.

[64] Lake County *v.* Rollins, 130 U. S. 662; Lake County *v.* Graham, *ibid.* 674; Zane *v.* Hamilton County, 189 *id.* 370; *cf.* Gunnison County Comrs. *v.* Rollins, 173 *id.* 255; H. & T. C. R. *v.* Texas, 177 *id.* 66.

[65] I. C. R. *v.* Illinois, 146 U. S. 387, 460. Two justices took no part in the decision and three justices dissented. See also I. C. R. *v.* Illinois, 184 *id.* 77; M. T. Co. *v.* Mobile, 187 *id.* 479. In Pearsall *v.* G. N. Ry., 161 *id.* 646, where a charter authorizing the consolidation of railways was modified by a statute prohibiting the consolidation of competing roads, before any such consolidation had been attempted, the court said: "We cannot recognize a vested right to do a manifest wrong." And see L. & N. R. *v.* Kentucky, 183 *id.* 503, 518.

permitted by the National Banking Act, does not impair the obligation of any contract.[66] On the same principle, a statutory exemption from state taxation, if granted in violation of the constitution of the state, does not bind the state as a contract.[67]

State insolvent laws.

62. There was, for some time, a controversy as to the effect of the constitutional prohibition upon state insolvent laws. In Sturges *v.* Crowninshield,[68] the action being brought in a federal court within the state of Massachusetts, and the plaintiff being a citizen of Massachusetts, and the defendant a citizen of New York, it was held that a discharge under an insolvent law of New York, enacted subsequently to the making within that state of a contract to be performed within the state, was void as an impairment of the obligation of that contract. In McMillan *v.* McNeill,[69] the action being brought in a court of the state of Louisiana, the plaintiff and defendant both being citizens of South Carolina, and the contract having been made and stipulated to be performed in that state, it was held that a discharge under an antecedently-enacted law of Louisiana impaired the obligation of the contract, and was no bar to its enforcement. In F. & M. Bank *v.* Smith,[70] the action being brought in a court of the state of Pennsylvania, and both plaintiff and defendant being residents of that state, and the contract having been made, and to be performed, in that state, it was held that a dis-

[66] People *v.* Commissioners of Taxes, 94 U. S. 415.

[67] Trask *v.* Maguire, 18 Wall. 391; Morgan *v.* Louisiana, 93 U. S. 217; Shields *v.* Ohio, 95 *id.* 319; R. Cos. *v.* Gaines, 97 *id.* 697; K. & W. R. *v.* Missouri, 152 *id.* 301; P. I. Co. *v.* Tennessee, 161 *id.* 193; G. & S. I. R. *v.* Hewes, 183 *id.* 66; *cf.* Lake County *v.* Graham, 130 *id.* 674.

[68] 4 Wheat. 122.

[69] 4 Wheat. 209.

[70] 6 Wheat. 131.

charge under a subsequently enacted insolvent law of that state was no bar to the action. In Ogden *v.* Saunders,[71] the plaintiff being a citizen of Kentucky and the defendant a citizen of New York, the contract having been made in New York to be performed in that state, and the action having been brought in a federal court in the state of Louisiana, it was held that a discharge under an antecedently-enacted insolvent law of the state of New York was no bar to the action; and in Shaw *v.* Robbins,[72] the same ruling was made, the action being brought in a court of the state of Ohio, the plaintiff being a citizen of Massachusetts, the defendant a citizen of New York, and the discharge set up being one that had been obtained under an antecedently-enacted insolvent law of the last-mentioned state. In Boyle *v.* Zacharie,[73] Story, J., said, "The effect of the discharge under the insolvent act is of course at rest, so far as it is covered by the antecedent decisions made by this court. The ultimate opinion delivered by Mr. Justice Johnson in the case of Ogden *v.* Saunders,[74] was concurred in and adopted by the three judges, who were in the minority upon the general question of the constitutionality of state insolvent laws, so largely discussed in that case," and [75] Marshall, C. J., expressed the same view as to the effect of the judgment in Ogden *v.* Saunders. In Sudyam *v.* Broadnax,[76] the action having been brought in a court of the state of Alabama, the plaintiff being a citizen of New York, it was held that a judicial declaration of the insolvency of a decedent's estate under the terms of an antecedently-

[71] 12 Wheat. 213.
[72] 12 Wheat. 369, note.
[73] 6 Pet. 643.
[74] 12 Wheat. 213, 358.
[75] P. 635.
[76] 14 Pet. 67.

enacted statute of Alabama was powerless to discharge a contract made by the decedent in his lifetime in New York and stipulated to be performed in that state. In Cook *v.* Moffat,[77] the action being brought in a federal court in the state of Maryland, the plaintiff being a citizen of New York and the defendant a citizen of Maryland, and the contract having been made in New York to be performed in that state, it was held that a discharge under an antecedently-enacted statute of Maryland was no bar to the action. In Baldwin *v.* Hale,[78] the action having been brought in a federal court in the state of Massachusetts, the plaintiff being a citizen of Vermont and the defendant a citizen of Massachusetts, and the contract having been made in Massachusetts, to be performed in that state, it was held that a discharge under an antecedently-enacted statute of Massachusetts did not bar the action. The result of the cases is, that a discharge under the insolvent laws of a state is not a bar to an action on a contract for the payment of money, *first:* when the law under which the discharge has been granted has been enacted subsequently to the making of the contract;[79] *second:* when, although the discharge has been granted under a law enacted antecedently to the making of the contract, the contract was made in another state to be performed in that other state;[80] *third:* when, although the discharge has been granted under a law enacted antecedently to the making of the contract, and although the contract was made and to be performed in the state in which the discharge has been granted, the action upon the contract is brought in another state, by a party who is not a citizen of the state

[77] 5 How. 295.

[78] 1 Wall. 223.

[79] Sturges *v.* Crowninshield, 4 Wheat. 122; F. & M. Bank *v.* Smith, 6 *id.* 131.

[80] McMillan *v.* McNeill, 4 Wheat. 209; Cook *v.* Moffat, 5 How. 295.

granting the discharge, and who has not made himself a party to the proceedings in insolvency;[81] and *fourth,* when, although the discharge has been granted under a law enacted antecedently to the making of the contract, and although the contract was made and to be performed in the state in which the discharge has been granted, the action upon the contract is brought in the state granting the discharge by one who is not a citizen of that state, and who has not made himself a party to the proceedings in insolvency.[82] The questions, as yet not concluded by the authority of the court, are as to the effect of the discharge as regards creditors, who, though not citizens of the state granting the discharge, voluntarily become parties to the insolvency proceedings, or, who, being citizens of the state granting the discharge, and being duly notified of the insolvency proceedings, neglect or refuse to become parties thereto.

Judgments as contracts.

63. Contracts for the payment of money being within the protection of the constitutional prohibition of the impairment of their obligation, judgments upon such contracts are equally entitled to protection.[83] Therefore, a judgment against a municipal corporation founded upon a breach of contract is not affected by a subsequent legislative abolition of the municipality's power to levy taxes for the payment of its debts.[84] But the rights of a judgment creditor are not impaired by a state statute reducing

[81] Ogden *v.* Saunders, 12 Wheat. 213; Shaw *v.* Robbins, *ibid.* 369, note. See also Denny *v.* Bennett, 128 U. S. 489.

[82] Baldwin *v.* Hale, 1 Wall. 223.

[83] Blount *v.* Windley, 95 U. S. 173.

[84] Memphis *v.* U. S., 97 U. S. 293; Wolff *v.* New Orleans, 103 *id.* 358; Louisiana *v.* Pilsbury, 105 *id.* 278; Ralls County Court *v.* U. S., *ibid.* 733; Nelson *v.* St. Martin's Parish, 111 *id.* 716; Mobile *v.* Watson, 116 *id.* 289; Scotland County Court *v.* U. S., 140 *id.* 41.

the rate of interest thereafter to accrue upon existing judgments;[85] nor are judgments founded upon torts contracts whose obligation will be protected against subsequent legislation.[86]

Municipal taxation.

64. A state cannot take away from a municipality existing powers of taxation so as to deprive of his compensation an officer who has served his term.[87] County bonds issued by public officers under authority of law either upon the subscription, or upon the agreement to subscribe, to the stock of a railway constitute a contract between the county and the bondholders, whose obligation cannot be impaired by a subsequent legislative repeal of the statute authorizing the subscription, or by a subsequent amendment to the state constitution prohibiting such a subscription.[88] But where public officers are by statute authorized to issue bonds in aid of railway construction only upon the fulfilment of a condition precedent which is not fulfilled before the adoption of an amended state constitution prohibiting the issue of such bonds there is no contract whose obligation is impaired by the adoption of the state constitution.[89] On the same principle, a statutory authorization of borrowing of money by a municipality is not a contract between the state and the municipal creditors whose obligation can be impaired by the subsequent exercise by the state of the power of modifying the rate of taxation or of exempting certain property from taxation,[90] but a state

[85] Morley *v.* L. S. & M. S. Ry., 146 U. S. 162.

[86] Louisiana *v.* New Orleans, 109 U. S. 285; Freeland *v.* Williams, 131 *id.* 405.

[87] Fisk *v.* Jefferson Police Jury, 116 U. S. 131.

[88] County of Moultrie *v.* Rockingham T. C. S. Bank, 92 U. S. 631.

[89] R. Co. *v.* Falconer, 103 U. S. 821.

[90] Gilman *v.* Sheboygan, 2 Bl. 510.

cannot dissolve an existing municipal corporation having a bonded debt, for whose payment powers of taxation have been granted and specifically pledged, for that dissolution interferes with the exercise of such power of taxation.[91] Nor can a state withdraw or restrict the taxing power of a municipality so as to impair the obligation of contracts which have been made on the pledge, express or implied, that that taxing power shall be exercised for their fulfilment.[92] A statutory prohibition of the issuing by the courts of the state of a *mandamus* to compel the levying of a tax for the payment of the interest upon, or the principal of, municipal bonds, whose issue had been legally authorized, impairs the contract between the municipality and the bondholder.[93] In general, the statutory authorization of the contracting by a municipality of an extraordinary debt by the issue of negotiable securities therefor conclusively implies a power in the municipality to levy taxes sufficient to pay the accruing interest upon, and the matured principal of, the debt, unless the statute conferring the authority, or the constitution of the state, or some general law in force at the time, clearly manifests a contrary legislative intent.[94]

History of the prohibition.

65. It has never been doubted that contracts between individuals were protected by the constitutional provision, but it was formerly a matter of grave doubt whether or not contracts to which a state was a party were likewise

[91] Mobile *v.* Watson, 116 U. S. 289. But see Meriwether *v.* Garrett, 102 *id.* 472.

[92] Memphis *v.* U. S., 97 U. S. 293; Wolff *v.* New Orleans, 103 *id.* 358; Ralls County Court *v.* U. S., 105 *id.* 733; Nelson *v.* St. Martin's Parish, 111 *id.* 716; Seibert *v.* Lewis, 122 *id.* 284; Scotland County Court *v.* U. S., 140 *id.* 41.

[93] Louisiana *v.* Pilsbury, 105 U. S. 278.

[94] Ralls County Court *v.* U. S., 105 U. S. 733.

entitled to protection. The history of the Constitution shows clearly that the mischiefs which the framers of the Constitution intended to remedy by this prohibition were, primarily, those caused by state legislation enabling debtors to discharge their debts otherwise than as stipulated in their contracts, and that the prohibition was not intended by its originators to interfere with the exercise of state sovereignty in cases of other than private contracts. This restriction on the power of the states is not to be found in either Mr. Pinckney's, Mr. Hamilton's, or Mr. Paterson's *projets* as presented to the convention, nor is it implied in Mr. Madison's resolutions, nor does it appear in the draft reported by the Committee of Five on 6th August, 1787; but when Article XIII of the report of that committee was under consideration on 28th August, Mr. King "moved to add in the words used in the ordinance of Congress establishing new states, a prohibition on the states to interfere in private contracts," but, on motion of Mr. Rutledge, as a substitute for Mr. King's proposition, there was adopted a prohibition of state bills of attainder and *ex post facto* laws.[95] The journal of the convention mentions Mr. Rutledge's motion, but omits all reference to Mr. King's proposition. Mr. Madison reports Mr. King's resolution, with the mention of declarations of opinion in favour of it by Messrs. Sherman, Wilson and Madison, and objections to it by Messrs. Gouverneur Morris and Mason, on the ground that state laws limiting the times within which actions might be brought necessarily interfered with contracts, and ought not to be prohibited, and that there might be other cases in which such interferences would be proper. There does not seem to be any record of any other discussion of this subject in the convention. The Committee of Revision

[95] Madison Papers, 5 Elliot's Debates, 485.

reported on 12th September, 1787, to the convention their revised draft of the Constitution, in which Article I, Section 10, declares "No state shall . . . pass any . . . laws altering or impairing the obligation of contracts." In convention on Friday, 14th September, 1787, the clause was finally amended and put into the form in which it appears in the Constitution, there being, so far as is known, no debate on the subject, save by Mr. Gerry, who "entered into observations inculcating the importance of the public faith and the propriety of the restraint put on the states from impairing the obligation of contracts," and unavailingly endeavoured to obtain the insertion in the Constitution of a similar restraint upon congressional action.[96] Mr. Bancroft states,[97] with reference to the Committee of Revision's report, that "Gouverneur Morris retained the clause forbidding *ex post facto* laws—and resolute not 'to countenance the issue of paper money and the consequent violation of contracts,'"[98] he of himself added the words, "No state shall pass laws altering or impairing the obligation of contracts."[99] Mr. Bancroft also quotes from the official report to the Governor of Connecticut made by Roger Sherman and Oliver Ellsworth, the deputies from that state to the Federal Convention, wherein they say, "The restraint on the legislatures of the several states respecting emitting bills of credit, making anything but money a tender in payment of debts, or impairing the obligation of contracts by *ex post facto* laws, was thought necessary as a security to commerce, in which the interest of foreigners, as well as of the citizens of different states, may be affected." The clause does not appear to have been made a subject of

[96] Madison Papers, 5 Elliot's Debates, 546.
[97] 2 Hist. of the Constitution, 214.
[98] G. Morris, by Sparks, III, 323.
[99] Gilpin, 1552, 1581.

discussion in any of the state conventions called to ratify the Constitution. Mr. Hamilton, when Secretary of the Treasury, said in his memorandum of 28th May, 1790, to President Washington on the subject of the resolutions of Congress with regard to the arrears of pay due to certain soldiers of the Revolution,[100] "The Constitution of the United States interdicts the states individually from passing any law impairing the obligation of contracts. This, to the more enlightened part of the community, was not one of the least recommendations of that Constitution. The too frequent intermeddlings of the state legislatures, in relation to private contracts were extensively felt, and seriously lamented; and a Constitution which promised a prevention, was, by those who felt and thought in that manner, eagerly embraced." Mr. Madison said in the Federalist,[1] "Bills of attainder, *ex post facto* laws, and laws impairing the obligation of contracts, are contrary to the first principles of the social compact, and to every principle of sound legislation. The two former are expressly prohibited by the declarations prefixed to some of the state constitutions, and all of them are prohibited by the spirit and scope of these fundamental charters. Our own experience has taught us, nevertheless, that additional fences against these dangers ought not be omitted. Very properly, therefore, have the convention added this constitutional bulwark in favour of personal security and private rights; and I am much deceived, if they have not, in so doing, as faithfully consulted the genuine sentiments as the undoubted interests of their constituents. The sober people of America are weary of the fluctuating policy which has directed the public councils. They have seen with regret and with indignation, that sudden

[100] Works of Hamilton, Lodge's Edition, Vol. II, p. 147.

[1] No. XLIV, Lodge's Edition.

changes, and legislative interferences, in cases affecting personal rights, become jobs in the hands of enterprising and influential speculators, and snares to the more industrious and less informed part of the community. They have seen, too, that one legislative interference is but the first link of a long chain of repetitions; every subsequent interference being naturally produced by the effects of the preceding. They very rightly infer, therefore, that some thorough reform is wanting, which will banish speculations on public measures, inspire a general prudence and industry, and give a regular course to the business of society." In Sturges *v.* Crowninshield,[2] Marshall, C. J., said "The fair, and, we think, the necessary construction of the sentence requires that we should give these words their full and obvious meaning. A general dissatisfaction with that lax system of legislation which followed the war of our revolution undoubtedly directed the mind of the convention to this subject. It is probable that laws, such as those which have been stated in argument, produced the loudest complaints, were most immediately felt. The attention of the convention, therefore, was particularly directed to paper money, and to acts which enabled the debtor to discharge his debt otherwise than as stipulated in the contract. Had nothing more been intended, nothing would have been expressed. But, in the opinion of the convention, much more remained to be done. The same mischief might be effected by other means. To restore public confidence completely, it was necessary not only to prohibit the use of particular means by which it might be effected, but to prohibit the use of any means by which the same mischief might be produced. The convention appears to have intended to establish a great principle, that contracts should be inviolable. The Constitution, there-

[2] 4 Wheat. 205.

fore, declares that no state shall pass 'any law impairing the obligation of contracts.' ''

State grants.

66. In 1810 the judgment in Fletcher *v.* Peck[3] established the doctrine that contracts to which a state is a party are within the protection of the constitutional prohibition. The facts in that case were these: in 1795 the state of Georgia enacted a statute authorizing the issue of a patent to "the Georgia Co." for a tract of land in that state, and on 13th January, 1795, the patent was issued. By sundry *mesne* conveyances before 1796 title in fee to a part of the tract vested in Peck, who had purchased for value and without notice of any matter which could invalidate the title of the state's grantees. In 1796 the state of Georgia enacted a statute repealing the Act of 1795 and annulling the patent to the Georgia Co. On 14th May, 1803, Peck conveyed to Fletcher, covenanting, *inter alia,* that his title had been "in no way constitutionally or legally impaired by virtue of any subsequent act of any subsequent legislature of the state of Georgia." Fletcher brought covenant *sur* deed against Peck in the Circuit Court, declaring, *inter alia,* that the statute of 1796 was enacted by reason of fraud practiced in securing the enactment of the statute of 1795 and was an impairment of Peck's title. Peck pleaded that he was a purchaser for value and without notice, etc. Fletcher demurred, and the court entered judgment thereon for Peck, which judgment was affirmed in the Supreme Court on a writ of error, the ground of decision being, that the constitutional prohibition comprehends contracts executed, including grants, as well as contracts executory, and that the states being prohibited from passing "any bill of

[3] 6 Cr. 87.

attainder, *ex post facto* law, or law impairing the obligation of contracts,'' and the prohibition of bills of attainder and *ex post facto* laws being a restraint upon governmental action, there is not to be implied ''in words which import a general prohibition to impair the obligation of contracts, an exception in favour of the right to impair the obligation of those contracts into which the state may enter.'' It has, therefore, since 1810, been settled that the term ''contract'' includes not only contracts between individuals, private and corporate, but also contracts, executed and executory, between the state and individuals, private and corporate. Following in the line of Fletcher *v.* Peck, it has been held that, a grant of land by a state to a railway corporation is a contract whose obligation is impaired by a subsequent act resuming the land,[4] that a state cannot deprive of his right to recover *mesne* profits from a disseisor one whose title vested under a compact between that state and another state, and who under that compact was entitled to recover *mesne* profits,[5] and that a state cannot, by statute, divest religious corporations of their title to land acquired under colonial laws antecedently to the revolution.[6]

Express contracts of exemption from taxation.

67. When in 1812 the case of New Jersey *v.* Wilson[7] came before the Supreme Court, the doctrine of Fletcher *v.* Peck necessarily required the court to hold that the state was bound by the express contract contained in a statute which authorized the purchase of certain land for the remnant of the tribe of Delaware

[4] Davis *v.* Gray, 16 Wall. 203; H. & T. C. Ry. *v.* Texas, 170 U. S. 243; *cf.* A. Ry. *v.* New York, 176 *id.* 335.

[5] Green *v.* Biddle, 8 Wheat. 1.

[6] Terrett *v.* Taylor, 9 Cr. 43.

[7] 7 Cr. 164.

Indians, and which, in terms, declared that the land so purchased "shall not hereafter be subject to any tax," and that that contract forbade the subsequent taxation of such lands, after their sale to other parties with the state's consent. The legal inviolability of a state's contract to exempt lands from state taxation having been thus established, it followed that a similar contract with regard to corporate franchises or assets was entitled to the like protection, and that contracts of exemption from state taxation, contained in corporate charters, or stipulated by subsequent agreement, if made in express terms and supported by an adequate consideration, constitute contracts so binding upon the state that their obligation cannot be impaired by a subsequent repeal of the charter, or by an imposition of a rate of taxation inconsistent with the state's contract.[8] Thus, the line and rolling stock of a railway cannot be taxed when its charter exempts from taxation its "property" and "shares;"[9] nor can the shares of the capital stock of a corporation be taxed in the hands of the shareholders, when the charter requires the corporation to pay to the state a tax on each share of the stock "in lieu of all other taxes;"[10] nor can the gross receipts of a corporation be taxed when its charter exempts the corporation from taxation;[11] nor can a corpor-

[8] Jefferson Branch Bank *v.* Skelly, 1 Bl. 436; Chicago *v.* Sheldon, 9 Wall. 50; W. & R. R. *v.* Reid, 13 *id.* 264; R. & G. R. *v.* Reid, *ibid.* 269; Humphrey *v.* Pegues, 16 *id.* 244; P. R. *v.* Maguire, 20 *id.* 36; New Jersey *v.* Yard, 95 U. S. 104; University *v.* People, 99 *id.* 309; Asylum *v.* New Orleans, 105 *id.* 362; W. & W. R. *v.* Alsbrook, 146 *id.* 279; M. & O. R. *v.* Tennessee, 153 *id.* 486; Shelby County *v.* Union & Planters' Bank, 161 *id.* 149; Stearns *v.* Minnesota, 179 *id.* 223; Citizens' Bank *v.* Parker, 192 *id.* 73; *cf.* G. & S. I. R. *v.* Hewes, 183 *id.* 66.

[9] W. & R. R. *v.* Reid, 13 Wall. 264; C. R. & B. Co. *v.* Wright, 164 U. S. 327.

[10] Farrington *v.* Tennessee, 95 U. S. 679; Bank of Commerce *v.* Tennessee, 161 *id.* 134, 163 *id.* 416; Shelby County *v.* Union & Planters' Bank, 161 *id.* 149.

[11] P. R. *v.* Maguire, 20 Wall. 36.

ation be taxed in excess of the limits specifically designated in the charter,[12] or other contract.[13] Nor can a municipal corporation, in the exercise of authority delegated to it by statute, assess a street railway for a new paving of a street, when the railway has contracted with the municipality to keep the street in repair, for the acceptance of that contract limits by necessary implication the obligation of the railway to repairs, and relieves it from liability for betterments;[14] nor can property held by a charitable corporation as an investment be taxed, when its charter exempts from taxation all property of whatever kind or description belonging to, or owned by, the corporation.[15] An adequate consideration for a charter exemption from taxation is to be found in the exercise by the corporation of the powers conferred by the charter,[16] or, in the case of corporations for charitable purposes, in the contribution of funds to the corporation for the accomplishment of its benevolent purpose.[17] So also the building by a railway corporation of its line, under the terms of a statute amendatory of its charter and granting in express terms an exemption from taxation, constitutes a consideration for the exemption, though the original charter granted a power to the corporation, which it did not exercise, to build the line.[18] Statutory exemptions from state taxation not incorporated in charters and unsupported by a consideration moving to the state, or from the exempted corporation, do not constitute irrepealable

[12] R. & G. R. *v.* Reid, 13 Wall. 269.

[13] New Jersey *v.* Yard, 95 U. S. 104.

[14] Chicago *v.* Sheldon, 9 Wall. 50.

[15] University *v.* People, 99 U. S. 309; Asylum *v.* New Orleans, 105 *id.* 362.

[16] C. Ry. *v.* C. S. R., 166 U. S. 557.

[17] University *v.* People, 99 U. S. 309; Asylum *v.* New Orleans, 105 *id.* 362.

[18] Humphrey *v.* Pegues, 16 Wall. 244.

contracts of exemption, but are subject to modification or repeal in the exercise of legislative discretion; as, for instance, bounty laws offering such an exemption as an inducement for the organization of corporations to develop a particular industry,[19] or voluntary grants of exemption of the real property of a charity from taxation.[20]

If the constitution of a state prohibits legislative grants of exemption from state taxation, such a grant, though accepted in good faith by the exempted corporation, cannot constitute a contract whose obligation is impaired by a subsequent imposition of taxation.[21] Such a constitutional prohibition operates to extinguish an exemption made by contract in the case of a railway which, having been exempted before the adoption of the constitutional prohibition, had been after the adoption thereof sold under foreclosure to reorganize the corporation.[22] On the same principle, a statutory consolidation of two railways works the dissolution of the original corporation, and subjects the consolidated corporation to the operation of an amended state constitution, which took effect subsequently to the incorporation of the original corporations, but prior to their consolidation; and, therefore, the state legislature may, without impairment of the obligation of the contract, prescribe rates for the transportation of passengers by the consolidated corporation, though one of the original corporations was by charter protected against

[19] Salt Co. *v.* East Saginaw, 13 Wall. 373; Welch *v.* Cook, 97 U. S. 541; W. & M. Ry. *v.* Powers, 191 *id.* 379.

[20] Christ Church *v.* Philadelphia, 24 How. 300; Grand Lodge *v.* New Orleans, 166 U. S. 143.

[21] R. Cos. *v.* Gaines, 97 U. S. 697; G. & S. I. R. Co. *v.* Hewes, 183 *id.* 66; *cf.* Stearns *v.* Minnesota, 179 *id.* 223, 253; N. C. Ry. *v.* Maryland, 187 *id.* 258.

[22] Trask *v.* Maguire, 18 Wall. 391; Morgan *v.* Louisiana, 93 U. S. 217; People *v.* Cook, 148 *id.* 397. See also Memphis City Bank *v.* Tennessee, 161 *id.* 186; P. Ins. Co. *v.* Tennessee, *ibid.* 193.

such legislative regulation.[23] General statutory prohibitions of the exemption of corporations from state taxation are not binding on subsequent legislatures,[24] unless referred to in, and incorporated with, subsequently granted charters.[25] In the case of a statutory consolidation accepted by two railways, each of whose charters contained a limited exemption from taxation, a reservation by a general statute before the enactment of the consolidating act and incorporated therewith, operates to extinguish the limited exemption contained in the original charters.[26] Of course, if the state in the charter reserves the right to alter, modify, or repeal that charter, that reservation authorizes any such amendment of the charter granted as will not defeat nor substantially impair the obligation of the grant or any rights that may be vested thereunder.[27] The first suggestion of any such reservation is to be found in the judgment of Parsons, C. J., in Wales *v.* Stetson,[28] which is cited by Miller, J., in Greenwood *v.* Freight Co.[29] A provision in a charter, or a general statute incorporated therewith, that that charter shall not be alterable in any other manner than by an act of the legislature, operates as a reserved power

[23] Shields *v.* Ohio, 95 U. S. 319.

[24] New Jersey *v.* Yard, 95 U. S. 104.

[25] Greenwood *v.* Freight Co., 105 U. S. 13; Tomlinson *v.* Jessup, 15 Wall. 454.

[26] R. Co. *v.* Georgia, 98 U. S. 359.

[27] Close *v.* Glenwood Cemetery, 107 U. S. 466; S. C. S. Ry. *v.* Sioux City, 138 *id.* 98; L. W. Co. *v.* Clark, 143 *id.* 1; H. G. L. Co. *v.* Hamilton City, 146 *id.* 258; People *v.* Cook, 148 *id.* 397; N. Y. & N. E. R. *v.* Bristol, 151 *id.* 556; Bryan *v.* Board of Education, *ibid.* 639; C. Ry. *v.* C. S. R. 166 *id.* 557; Covington *v.* Kentucky, 173 *id.* 231; Citizens' Savings Bank *v.* Owensboro, *ibid.* 636; Looker *v.* Maynard, 179 *id.* 46; G. & S. I. R. *v.* Hewes, 183 *id.* 66; B. W. S. Co. *v.* Mobile, 186 *id.* 212; *cf.* Stearns *v.* Minnesota, 179 *id.* 223, 239. See also Pearsall *v.* G. N. Ry., 161 *id.* 646; N. C. Ry. *v.* Maryland, 187 *id.* 258; Wright *v.* M. M. L. I. Co., 193 *id.* 657.

[28] 2 Mass. 146.

[29] 105 U. S. 13, 19.

authorizing a statutory amendment of the charter.[30] Express contracts of exemption from state taxation are to be strictly construed.[31] Thus a charter of a railway imposing an annual tax assessed on the cost of the line, reserving the right to impose taxes on the gross earnings of the corporation and stipulating that the above several taxes shall be in lieu of other taxation, is not a contract whose obligation is impaired by a subsequent statute taxing lands owned by the railway and mortgaged as security for its bonded debt, but not used in the construction or operation of its line.[32] So a provision in the charter of a ferry company that it "shall be subject to the same taxes as are now or hereafter may be imposed on other ferries," does not exempt the corporation from liability to pay an annual license fee on each of its boats, under the requirements of a municipal ordinance enacted under due legislative authority.[33] So the charter of a street railway requiring the payment to the municipality of such annual license "as is now paid by other railway companies," is to be construed to mean that the company shall not at any future time be required to pay a greater license than that then required to be paid by other companies.[34] So a general exemption of the property of a corporation from

[30] Pennsylvania College Cases, 13 Wall. 190; Miller *v.* State, 15 *id.* 478; Holyoke Company *v.* Lyman, *ibid.* 500.

[31] Tucker *v.* Ferguson, 22 Wall. 527; R. Cos. *v.* Gaines, 97 U. S. 697; Ry. Co. *v.* Philadelphia, 101 *id.* 528; Picard *v.* E. T., V. & G. R., 130 *id.* 637; Y. & M. V. R. *v.* Thomas, 132 *id.* 174; W. & W. R. *v.* Alsbrook, 146 *id.* 279; W. & St. P. L. Co. *v.* Minnesota, 159 *id.* 526; P. F. & M. I. Co. *v.* Tennessee, 161 *id.* 174; Central R. & B. Co. *v.* Wright, 164 *id.* 327; Ford *v.* D. & P. L. Co., *ibid.* 662; Citizens' Savings Bank *v.* Owensboro, 173 *id.* 636; Wells *v.* Savannah, 181 *id.* 531; Orr *v.* Gilman, 183 *id.* 278; Chicago Theological Seminary *v.* Illinois, 188 *id.* 662; *cf.* Citizens' Bank *v.* Parker, 192 *id.* 73.

[32] Tucker *v.* Ferguson, 22 Wall. 527. See also Ford *v.* D. & P. L. Co., 164 U. S. 662.

[33] W. F. Co. *v.* East St. Louis, 107 U. S. 365.

[34] Ry. Co. *v.* Philadelphia, 101 U. S. 528.

taxation is construed as referring only to the property held for the transaction of the business of the company.[35] And the exemption of the capital of a corporation from taxation does not necessarily exempt its stockholders from taxation on their shares of stock.[36] Nor does a statute by which lands granted to a railway company are exempted from taxation until such lands shall be sold and conveyed by that company remain operative after the full equitable title has been transferred by the railway.[37] A charter granting to a corporation all the rights, powers, and privileges "granted by the charter" of another corporation, confers an exemption from state taxation contained, not in the charter to which reference is made, but in a statute amendatory thereof, and the exemption thus conferred constitutes a contract whose obligation cannot be impaired by a subsequent repeal of the statute conferring by reference the right of exemption.[38] So a state may make a contract conferring the exclusive right of building a toll bridge by reference to a previously enacted statute.[39] On the other hand, the incorporation of a railway by a charter investing the company "for the purpose of making and using the said road with all powers, rights, and privileges, and subject to the disabilities and restrictions that have been conferred and imposed upon" another railway company, whose charter contained an express exemption from taxation, does not confer that exemption on the former company.[40] So in the case of the merger of a corporation having an exemption from state taxation for

[35] Ford *v.* D. & P. L. Co., 164 U. S. 662.

[36] New Orleans *v.* Citizens' Bank, 167 U. S. 371; *cf.* Shelby County *v.* Union & Planters' Bank, 161 *id.* 149.

[37] W. & St. P. L. Co. *v.* Minnesota, 159 U. S. 526.

[38] Humphrey *v.* Pegues, 16 Wall. 244.

[39] Binghamton Bridge, 3 Wall. 51.

[40] R. Cos. *v.* Gaines, 97 U. S. 697. See also G. & S. I. R. *v.* Hewes, 183 *id.* 66.

a limited period with another corporation having an unlimited exemption, the consolidating statute not granting any exemption, the consolidated corporation cannot claim as to property acquired from the first mentioned corporation any exemption beyond the limits contained in the charter of that corporation.[41] So also a grant of immunity from taxation will not pass merely by a conveyance of the property and franchises of a railroad company, although such company may hold its property exempt from taxation.[42]

Express grants of peculiar privileges.

68. Express stipulations in a charter as to the privileges thereby conferred on the corporation are also within the protection of the constitutional prohibition; thus, a provision in the charter of a toll bridge company that it shall not be lawful for any person to erect another bridge within a specified distance of the bridge thereby authorized, constitutes a contract binding the state not to authorize the construction of such other bridge,[43] but the authorization by the state of the construction of a railway viaduct does not impair the obligation of such a contract.[44] So, also, a statute forbidding the transfer by any bank of any note, bill receivable, or other evidence of debt, impairs the obligation of a contract created by the grant in a charter of a bank of power to receive, hold, and grant chattels and effects of what kind soever, and to receive

[41] Tomlinson *v.* Branch, 15 Wall. 460; W. & W. R. *v.* Alsbrook, 146 U. S. 279. See also P. G. & C. Co. *v.* Chicago, 194 *id.* 1.

[42] Picard *v.* E. T., V. & G. R., 130 U. S. 637; People *v.* Cook, 148 *id.* 397; N. C. Ry. *v.* Maryland, 187 *id.* 258. See also N. & W. R. *v.* Pendleton, 156 *id.* 667; C. & L. T. R. Co. *v.* Sandford, 164 *id.* 578.

[43] Bridge Proprietors *v.* Hoboken Co., 1 Wall. 116; Binghamton Bridge, 3 *id.* 51; *cf.* Williams *v.* Wingo, 177 U. S. 601.

[44] Bridge Proprietors *v.* Hoboken Co., 1 Wall. 116.

deposits and discount notes.[45] On the same principle, a state is bound by its express contracts, not including appointments to public office, between the state and an individual for the performance of special services for a stipulated compensation,[46] by its grants of franchises and exclusive privileges, such as the privilege of supplying a municipality with water,[47] or gas,[48] by its contracts conceding peculiar privileges to state obligations, as, for instance, stipulating that coupons of state bonds should be receivable for taxes,[49] or that the circulating notes of a bank should be receivable in payment for taxes,[50] or of other debts due to the state,[51] by contracts made by a political subdivision of the state for the payment of the principal of, or interest upon, the public debt of that subdivision,[52] and by the contracts of a corporation, whose sole shareholder is the state, for the payment of the corporate debt.[53] Contracts between two or more states, under which private rights have vested,[54] are so far protected that neither state can annul or modify such contracts to the prejudice of the private rights so vested.

[45] Planters' Bank *v.* Sharp, 6 How. 301.

[46] Hall *v.* Wisconsin, 103 U. S. 5; *cf.* Missouri *v.* Walker, 125 *id.* 339.

[47] N. O. W. W. *v.* Rivers, 115 U. S. 674; St. T. W. W. *v.* N. O. W. W., 120 *id.* 64; Walla Walla *v.* W. W. W. Co., 172 *id.* 1. See also Los Angeles *v.* L. A. W. Co., 177 *id.* 558; F. W. Co. *v.* Freeport, 180 *id.* 587; S. W. W. Co. *v.* Skaneateles, 184 *id.* 354.

[48] N. O. G. Co. *v.* L. L. Co., 115 U. S. 650; L. G. Co. *v.* C. G. Co., *ibid.* 683.

[49] Hartman *v.* Greenhow, 102 U. S. 672; Virginia Coupon Cases, 114 *id.* 270; Royall *v.* Virginia, 116 *id.* 572, 121 *id.* 102; McGahey *v.* Virginia, 135 *id.* 662; McCullough *v.* Virginia, 172 *id.* 102.

[50] Furman *v.* Nichol, 8 Wall. 44; Keith *v.* Clark, 97 U. S. 454.

[51] Woodruff *v.* Trapnall, 10 How. 190; Paup *v.* Drew, *ibid.* 218; Trigg *v.* Drew, *ibid.* 224.

[52] Murray *v.* Charleston, 96 U. S. 432.

[53] Curran *v.* Arkansas, 15 How. 304; Barings *v.* Dabney, 19 Wall. 1.

[54] Green *v.* Biddle, 8 Wheat. 1; C. & C. Bridge Co. *v.* Kentucky, 154 U. S. 204.

Contracts between a state and its political subdivisions.

69. There can be no contract between a state and a political subdivision of a state, such as a municipality, giving to the municipality a vested right to property, for all such property rights are held by the municipality in trust for the state, and are subject to revocation at the state's pleasure.[55] Therefore, a statute imposing a pecuniary penalty upon a railway, payable by it to a county of the state for its failure to locate the railway on a certain line, does not constitute a contract between the county and the railway whose obligation is impaired by a subsequent repeal of the statute.[56] On the same principle, a legislative charter of a railway, granting to it power to appropriate public wharves erected by a municipality under a prior legislative grant of authority, does not impair the obligation of any contract, nor infringe upon the rights of the municipality.[57] And a grant to a township of the power of taxation is always subject to revocation, modification, and control by the legislative authority of the state.[58]

Implied contracts in charters of incorporation.

70. The next mooted question under this clause of the Constitution was whether or not a charter of incorporation granted by a state constituted an implied contract on the part of the state, whose obligation the state could not be permitted to impair by a subsequent repeal or modification of the charter. The leading case is Trustees of Dartmouth College *v.* Woodward,[59] judgment in which

[55] Maryland *v.* B. & O. R., 3 How. 534; East Hartford *v.* H. Bridge Co., 10 *id.* 511; R. Co. *v.* Ellerman, 105 U. S. 166; New Orleans *v.* N. O. W. W., 142 *id.* 79; *cf.* Essex Pub. Road Board *v.* Skinkle, 140 *id.* 334.

[56] Maryland *v.* B. & O. R., 3 How. 534.

[57] R. Co. *v.* Ellerman, 105 U. S. 166.

[58] Williamson *v.* New Jersey, 130 U. S. 189.

[59] 4 Wheat. 518.

was rendered in 1819, and the facts in which were that, in 1769, the royal governor of the province of New Hampshire, acting in the name of the king, granted to Dr. Wheelock and eleven other persons a charter, whereby they were incorporated under the title of "The Trustees of Dartmouth College," with perpetual succession, and with "the whole power of governing the college, of appointing and removing tutors, of fixing their salaries, of directing the course of study to be pursued by the students, and of filling vacancies created in their own body." After the charter had been granted to, and accepted by, the corporation, "property both real and personal, which had been contributed for the benefit of the college, was conveyed to and vested in the corporate body." Acts of the legislature of the state of New Hampshire, passed on 27th June, and 18th December, 1816, increased "the number of trustees to twenty-one," gave "the appointment of the additional number to the executive of the state," and created "a board of overseers, to consist of twenty-five persons, of whom twenty-one are also appointed by the executive of New Hampshire," with "power to inspect and control the most important acts of the trustees." Prior to the enactment of these statutes, one Woodward was the secretary and treasurer of the corporation, and, as such, he had in his possession the charter, corporate seal, records, and certain chattels belonging to the corporation; in 1816 the trustees removed him from office; in 1817 he was appointed secretary and treasurer of the new board of trustees, which was organized under the statutes of 1816, and, as he refused to surrender to the original corporation the property which was in his hands, that corporation brought an action of trover in a court of the state of New Hampshire against him, in which the facts as stated having been found by a

special verdict, judgment was entered in favour of the defendant by the state court of last resort, and the cause was removed by writ of error to the Supreme Court of the United States, which reversed the judgment of the state court, the ground of decision being that the college as incorporated was a private eleemosynary corporation; that its charter, in terms, and by force of the donations of funds made on the faith of it, constituted a contract between the colonial government and the corporation as the representative of the donors of those funds; that it was an implied, but essential, condition of that contract that that charter should not be so modified, without the consent of the corporation, as to substitute governmental control for the will of the donors; that, by the revolution, the duties, as well as the powers, of government devolved on the people of New Hampshire, and the obligations imposed by the charter were the same under the state government as they had formerly been under the colonial government; and that the effect of the statutes of 1816 was to substitute the will of the state for the will of the donors, and, to that extent, to impair the obligation of the contract between the state and the corporation, as made by the charter. Marshall, C. J., in his judgment,[60] after accepting the suggestion, that "taken in its broad, unlimited sense, the clause would be an unprofitable and vexatious interference with the internal concerns of a state, would unnecessarily and unwisely embarrass its legislation, and render immutable those civil institutions, which were established for purposes of internal government, and which, to subserve those purposes, ought to vary with varying circumstances;" and "that as the framers of the Constitution could never have intended to insert in that instrument a provision so unnecessary, so mischievous,

[60] 4 Wheat. pp. 628, 629.

and so repugnant to its general spirit, the term 'contract' must be understood in a more limited sense,'' expressly conceded, that ''the framers of the Constitution did not intend to restrain the states in the regulation of their civil institutions, adopted for internal government, and that the instrument they have given us is not to be so construed,'' and that ''the provision of the Constitution never has been understood to embrace other contracts, than those which respect property, or some object of value, and confer rights which may be asserted in a court of justice,'' put his judgment on the ground that the charter of the college constituted a contract as hereinbefore stated. Applying to the Dartmouth College Case, the test so clearly stated by Marshall, C. J., in Ogden *v.* Saunders,[61] that ''the positive authority of a decision is co-extensive with the facts on which it is made,'' it is obvious that the case is an authority for the proposition, that the grant by a state of a charter of incorporation for private purposes unconnected with the administration of government constitutes a contract between the state and the corporation, whose obligation is not to be permitted to be impaired by a material modification of the terms of the charter, either expressed or implied, and that, in every such charter it is an implied condition of the contract, that the state shall not by subsequent legislation change either the purpose of the corporation, or its system of administration.

Implied corporate exemption from taxation.

71. The later cases have narrowed the doctrine of the Dartmouth College case with regard to the implied contracts created by charters, and thereby made obligatory on the states granting them. In Providence Bank *v.*

[61] 12 Wheat. 333.

Billings,[62] it was decided, in 1830, that the grant of corporate privileges does not carry with it any implied exemption of either the corporate franchise, or property, from state taxation, and this principle has been re-asserted in the later cases of M. G. Co. *v.* Shelby County,[63] N. M. R. *v.* Maguire,[64] Bailey *v.* Maguire,[65] and Tucker *v.* Ferguson.[66] Following in the same line, it has been held that the imposition in a charter of a specific form or rate of taxation is not to be construed in the absence of an express contract of exemption from other taxation to constitute an implied exemption from such other taxation;[67] and that the grant to a corporation of the right to sell its franchises does not entitle the vendee to exemptions from taxation granted to the vendor.[68]

Implied grants of peculiar privileges.

72. On the same principle, it has been held that legislative grants of special or exclusive privileges are, in the interests of the public, to be strictly construed, and do not vest in the grantee any powers other than those expressly granted.[69] Thus, the charter of a corporation by a state

[62] 4 Pet. 514.

[63] 109 U. S. 398.

[64] 20 Wall. 46.

[65] 22 Wall. 215.

[66] 22 Wall. 527.

[67] License Tax Cases, 5 Wall. 462; Delaware R. Tax, 18 *id.* 206; Erie Ry. *v.* Pennsylvania, 21 *id.* 492; Home Ins. Co. *v.* Augusta, 93 U. S. 116; S. C. S. Ry. *v.* Sioux City, 138 *id.* 98; N. O. C. & L. R. *v.* New Orleans, 143 *id.* 192; W. & W. R. *v.* Alsbrook, 146 *id.* 279; Shelby Co. *v.* Union & Planters' Bank, 161 *id.* 149; New Orleans *v.* Citizens' Bank, 167 *id.* 371.

[68] People *v.* Cook, 148 U. S. 397; Picard *v.* East T., V. & G. R., 130 *id.* 637; K. & W. R. *v.* Missouri, 152 *id.* 301; N. C. Ry. *v.* Maryland, 187 *id.* 258. See also Shields *v.* Ohio, 95 *id.* 319; St. L. & S. F. Ry. *v.* Gill, 156 *id.* 649; N. & W. R. *v.* Pendleton, *ibid.* 667; P. F. & M. I. Co. *v.* Tennessee, 161 *id.* 174; Memphis City Bank *v.* Tennessee, *ibid.* 186; P. I. Co. *v.* Tennessee, *ibid.* 193; C. & L. T. R. Co. *v.* Sandford, 164 *id.* 578; G. R. & I. Ry. *v.* Osborn, 193 *id.* 17.

[69] Rice *v.* R. Co., 1 Bl. 358; Charles River Bridge *v.* Warren Bridge,

does not constitute a contract by the state, either with the corporation or with the creditors thereof, that the corporation shall not subsequently be dissolved after due legal proceedings founded upon a forfeiture of the corporate franchises either for misuser or for non-user.[70] So, also, the creation of a corporation with the power to erect a toll bridge, or to operate a ferry, does not impliedly bind the state not to license the establishment of a competing bridge or ferry, either toll or free.[71] The grant to a contractor of the sole privilege of supplying a municipality with water from a designated source is not impaired by the grant to another party of the privilege of supplying it with water from another source;[72] and a municipality which has granted to a company the right to erect and operate an electric lighting plant does not impair the obligation of the contract by erecting a plant for itself.[73] Nor does the grant to a quasi-public corporation of the right to sell its franchises by implication extend to the vendee any exemption from rate regulation which was possessed by its vendor;[74] nor may a vendee

11 Pet. 544; Mills *v.* St. Clair County, 8 How. 581; Perrine *v.* C. & D. C. Co., 9 *id.* 172; R. & P. R. *v.* L. R., 13 *id.* 81; O. L. I. & T. Co. *v.* Debolt, 16 *id.* 416; Jefferson Branch Bank *v.* Skelly, 1 Bl. 436; The Binghamton Bridge, 3 Wall. 51, 75; G. R. & B. Co. *v.* Smith, 128 U. S. 174; Stein *v.* B. W. S. Co., 141 *id.* 67; H. G. L. Co. *v.* Hamilton City, 146 *id.* 258; M. & St. L. Ry. *v.* Gardner, 177 *id.* 332; L. & N. R. *v.* Kentucky, 183 *id.* 503; Joplin *v.* S. M. L. Co., 191 *id.* 150; Stanislaus County *v.* S. J. & K. R. C. & I. Co., 192 *id.* 201; Shaw *v.* Covington, 194 *id.* 593. See also Owensboro *v.* O. W. S. Co., 191 *id.* 358.

[70] Mumma *v.* The Potomac Co., 8 Pet. 281, 286; C. L. I. Co. *v.* Needles, 113 U. S. 574, 584.

[71] Fanning *v.* Gregoire, 16 How. 524; Turnpike Co. *v.* State, 3 Wall. 210; Wright *v.* Nagle, 101 U. S. 791; W. & B. Bridge Co. *v.* W. B. Co., 138 *id.* 287; Williams *v.* Wingo, 177 *id.* 601.

[72] Stein *v.* B. W. S. Co., 141 U. S. 67.

[73] Joplin *v.* S. M. L. Co., 191 U. S. 150. See also N. W. Co. *v.* Newburyport, 193 *id.* 561.

[74] Shields *v.* Ohio, 95 U. S. 319; St. L. & S. F. Ry. *v.* Gill, 156 *id.* 649; N. & W. R. *v.* Pendleton, *ibid.* 667; C. & L. T. R. Co. *v.* Sandford, 164 *id.* 578; G. R. & I. Ry. *v.* Osborn, 193 *id.* 17.

which is exempt from such regulation claim exemption as to property which it acquires from a company which was not exempt.[75]

Exemption from the operation of the police power.

73. There is no implied contract in a charter that the state will exempt the corporate franchises and property from the operation of such legislation as the state may deem necessary to secure the welfare of its citizens.[76] The granting, therefore, of a charter to an insurance company does not invalidate a subsequent statute which requires that company to make a full return showing its business condition to the proper officers of the state.[77] Nor can a state surrender by implication the right to regulate by subsequent legislation the location of railway stations and the stoppage of trains at those stations;[78] nor to require by such legislation the fencing of all tracks used by railway companies within the state.[79] Nor can a state by implication exempt a railway company from liability in

[75] P. G. & C. Co. *v.* Chicago, 194 U. S. 1.

[76] C., B. & Q. R. *v.* Iowa, 94 U. S. 155; Peik *v.* C. & N. W. Ry., *ibid.* 164; W. & St. P. R. *v.* Blake, *ibid.* 180; Boyd *v.* Alabama, *ibid.* 645; Beer Co. *v.* Massachusetts, 97 *id.* 25; Fertilizing Co. *v.* Hyde Park, *ibid.* 659; Ruggles *v.* Illinois, 108 *id.* 526; Stone *v.* F. L. & T. Co., 116 *id.* 307; G. R. & B. Co. *v.* Smith, 128 *id.* 174; P. R. *v.* Miller, 132 *id.* 75; C., M. & St. P. Ry. *v.* Minnesota, 134 *id.* 418; W. & B. Bridge Co. *v.* W. Bridge Co., 138 *id.* 287; New York *v.* Squire, 145 *id.* 175; M. & St. L. Ry. *v.* Emmons, 149 *id.* 364; E. I. Co. *v.* Ohio, 153 *id.* 446; N. & W. R. *v.* Pendleton, 156 *id.* 667; Pearsall *v.* G. N. Ry., 161 *id.* 646; L. & N. R. *v.* Kentucky, *ibid.* 677; St. L. & S. F. Ry. *v.* Mathews, 165 *id.* 1; C., B. & Q. R. *v.* Chicago, 166 *id.* 226; L. I. W. Co. *v.* Brooklyn, *ibid.* 685; W. R. *v.* Defiance, 167 *id.* 88; C., B. & Q. R. *v.* Nebraska, 170 *id.* 57; A. Ry. *v.* New York, 176 *id.* 335; F. W. Co. *v.* Freeport, 180 *id.* 587; K. I. Co. *v.* Harbison, 183 *id.* 13; L. & N. R. *v.* Kentucky, *ibid.* 503; Stanislaus County *v.* S. J. & K. R. C. & I. Co., 192 *id.* 201; *cf.* N. Y., L. E. & W. R. *v.* Pennsylvania, 153 *id.* 628; C. M. L. I. Co. *v.* Spratley, 172 *id.* 602.

[77] E. I. Co. *v.* Ohio, 153 U. S. 446.

[78] R. Co. *v.* Hamersley, 104 U. S. 1.

[79] M. & St. L. Ry. *v.* Emmons, 149 U. S. 364.

damages for fires caused by its locomotives,[80] or for injury to property in the construction of its road.[81] On the same principle, the grant of a franchise to a railway does not preclude a municipality from making reasonable regulations as to the use of its streets.[82] A state which, by charter, has authorized a railroad to consolidate with other roads, may forbid its future consolidation with competing roads.[83] A state may place reasonable limitations upon the rates of fare and freight charged by its railways.[84] It may, in the case of a railway whose charter authorizes the company from time to time to fix, regulate and receive tolls and charges, vest in a commission by a subsequent statute the power of fixing those rates.[85] It may by statute regulate the rates of a water corporation whose charter vested the power of fixing the rates in a board of commissioners, some of whom were appointed by the company.[86] And it has been said that where a water company was organized under a statute which provided that the commissioners should not reduce the rates below a given point, the state may by subsequent statute authorize the commissioners to reduce the rates below that

[80] St. L. & S. F. Ry. *v.* Mathews, 165 U. S. 1.

[81] P. R. *v.* Miller, 132 U. S. 75.

[82] Baltimore *v.* B. T. Co., 166 U. S. 673; W. R. *v.* Defiance, 167 *id.* 88. See also C., B. & Q. R. *v.* Nebraska, 170 *id.* 57; L. G. L. Co. *v.* Murphy, *ibid.* 78.

[83] Pearsall *v.* G. N. Ry., 161 U. S. 646.

[84] C., B. & Q. R. *v.* Iowa, 94 U. S. 155; Ruggles *v.* Illinois, 108 *id.* 526; G. R. & B. Co. *v.* Smith, 128 *id.* 174; M. E. Ry. *v.* Minnesota, 134 *id.* 467; L. & N. R. *v.* Kentucky, 183 *id.* 503. In Reagan *v.* F. L. & T. Co., 154 *id.* 362, 393, after admitting that a state has the general power to regulate rates, the court suggested, but did not decide, that there might be an implied grant to the railway of the right to reasonable tolls.

[85] Stone *v.* F. L. & T. Co., 116 U. S. 307; Stone *v.* I. C. R., *ibid.* 347; C., M. & St. P. Ry. *v.* Minnesota, 134 *id.* 418. See also Owensboro *v.* O. W. Co., 191 *id.* 358.

[86] S. V. W. W. *v.* Schottler, 110 U. S. 347; *cf.* F. W. Co. *v.* Freeport, 180 *id.* 587.

point.[87] Indeed, while a state may, by an express agreement,[88] bind itself not to regulate the rates charged by a quasi-public corporation, such as a water-supply[89] or street railway[90] company, a state cannot, even by an express contract, bargain away its right to enact such legislation as may be necessary to secure the safety or to protect the health or the morals of its citizens. It may amend statutes which regulate the construction of railroads within its limits.[91] It may forbid the continued prosecution of their respective trades by corporations chartered by it for the purpose of rendering dead animals into fertilizers,[92] or manufacturing and selling liquors,[93] or selling lottery tickets and drawing lotteries.[94] And, upon this principle, it has also been held that a state may, in derogation of a previous grant of the exclusive privilege of slaughtering cattle, authorize others to conduct the same business.[95]

Contracts as to matters of public concern.

74. In Dartmouth College *v.* Woodward,[96] Marshall, C. J., conceded that "the framers of the Constitution did

[87] Stanislaus County *v.* S. J. & K. R. C. & I. Co., 192 U. S. 201. In this case, however, the state constitution had reserved to the legislature the power to amend or repeal the law in question.

[88] Even an express grant of exemption from regulation does not by implication extend to a purchaser from the grantee: Shields *v.* Ohio, 95 U. S. 319; St. L. & S. F. Ry. *v.* Gill, 156 *id.* 649; N. & W. R. *v.* Pendleton, *ibid.* 667; C. & L. T. R. Co. *v.* Sandford, 164 *id.* 578; G. R. & I. Ry. *v.* Osborn, 193 *id.* 17; and see P. G. & C. Co. *v.* Chicago, 194 *id.* 1.

[89] Los Angeles *v.* L. A. W. Co., 177 U. S. 558; *cf.* K. W. Co. *v.* Knoxville, 189 *id.* 434.

[90] Detroit *v.* D. C. S. Ry., 184 U. S. 368; Cleveland *v.* C. C. Ry., 194 *id.* 517; Cleveland *v.* C. E. Ry., *ibid.* 538; *cf.* F. W. Co. *v.* Freeport, 180 *id.* 587; L. & N. R. *v.* Kentucky, 183 *id.* 503, 518.

[91] C., B. & Q. R. *v.* Nebraska, 170 U. S. 57.

[92] Fertilizing Co. *v.* Hyde Park, 97 U. S. 659.

[93] Beer Co. *v.* Massachusetts, 97 U. S. 25.

[94] Stone *v.* Mississippi, 101 U. S. 814; Douglas *v.* Kentucky, 168 *id.* 488.

[95] Butchers' Union *v.* C. C. Co., 111 U. S. 746.

[96] 4 Wheat. 629.

not intend to restrain a state from the regulation of its civil institutions adopted for internal government." On this principle, there can be no implied contract on the part of a state that it will not amend its constitution, in so far as that constitution deals with the administration of the public concerns of the state.[97] Nor can a state legislature bind subsequent legislatures as to the exercise of the powers of sovereignty over the political subdivisions of the state, and over its municipal corporations with regard to subject-matters of public and not of private interest, as, for instance, the location of a county seat,[98] or the boundaries of its municipalities,[99] or the sale of property held by a municipality for public purposes, such as water works,[100] or the appropriation under state authority of municipal obligations by their holders as a set-off against municipal claims against those holders;[1] nor does the appointment by the state of a public officer for a fixed term for a stipulated compensation constitute a contract between the state and the appointee whose obligation is impaired by either the reduction of his compensation or his removal from office,[2] but after the duties have been performed by the appointee of a municipal corporation during the term of his office there is a contract whose obligation is impaired by a subsequent statute abolishing the power of taxation for the payment of his compensation.[3] Of course, in the case of an officer appointed under a statute which in terms defines the tenure of the office to

[97] Church *v.* Kelsey, 121 U. S. 282.

[98] Newton *v.* Commissioners, 100 U. S. 548.

[99] U. S. *v.* Memphis, 97 U. S. 284.

[100] New Orleans *v.* Morris, 105 U. S. 600.

[1] Amy *v.* Shelby County, 114 U. S. 387.

[2] Butler *v.* Pennsylvania, 10 How. 402; *cf.* Crenshaw *v.* U. S., 134 U. S. 99; Pennie *v.* Reis, 132 *id.* 464.

[3] Fisk *v.* Jefferson Police Jury, 116 U. S. 131.

be according to law, a subsequent statute removing him is not an impairment of the contract.[4]

The withdrawal by a state of its consent to be sued.

75. The state's consent to be sued being voluntary and of grace, that consent does not constitute a contract whose obligation can be impaired by a subsequent repeal of the statute permitting such suit,[5] especially where the statute authorizing the suit has provided no means for the enforcement of any judgment that may be rendered against the state. Under such circumstances the state may, by subsequent legislation, withdraw its consent to be sued.[6] In this connection, that which was forcibly said by Mathews, J., in the judgment of the court in the case of *In re* Ayers,[7] may well be borne in mind. The learned judge said: "It cannot be doubted that the XI Amendment to the Constitution operates to create an important distinction between contracts of a state with individuals and contracts between individual parties. In the case of contracts between individuals, the remedies for their enforcement or breach, in existence at the time they were entered into, are a part of the agreement itself, and constitute a substantial part of its obligation.[8] That obligation . . . cannot be impaired by any subsequent legislation. Thus, not only the covenants and conditions of the contract are preserved, but also the substance of the original remedies for its enforcement. It is different with contracts between individuals and a state. In respect to these, by virtue of the XI Amendment to the Constitution,

[4] Head *v.* University, 19 Wall. 526.

[5] Beers *v.* Arkansas, 20 How. 527; Bank of Washington *v.* Arkansas, *ibid.* 530.

[6] R. Co. *v.* Tennessee, 101 U. S. 337; R. Co. *v.* Alabama, *ibid.* 832; Baltzer *v.* North Carolina, 161 *id.* 240.

[7] 123 U. S. 504.

[8] Louisiana *v.* New Orleans, 102 U. S. 203.

there being no remedy by a suit against the state, the contract is substantially without sanction, except that which arises out of the honour and good faith of the state itself, and these are not subject to coercion. Although the state may, at the inception of the contract, have consented as one of its conditions to subject itself to suit, it may subsequently withdraw that consent and resume its original immunity, without any violation of the obligation of its contract in the constitutional sense."[9] Yet, as was pointed out by Bradley, J., in Hans *v.* Louisiana,[10] "where property or rights are enjoyed under a grant or contract made by a state, they cannot wantonly be invaded. Whilst the state cannot be compelled by suit to perform its contracts, any attempt on its part to violate property or rights acquired under its contracts may be judicially resisted; and any law impairing the obligation of contracts under which such property or rights are held is void and powerless to affect their enjoyment."

The force and effect of the prohibition as construed by the Supreme Court.

76. The force and effect of the prohibition, as construed by the court, is, that a state may not, by any law or by any act to which the state, by its enforcement thereof, gives the force of a law, deprive a party of the legal right of enforcing, or obtaining compensation for the breach of, an express contract, executed or executory, between individuals, or between a state and individuals, but a state may regulate or limit the remedies of the contracting parties, provided that it leaves in force a substantial part of the legal remedies which subsisted at the time of the making of the contract.

[9] Beers *v.* Arkansas, 20 How. 527; R. Co. *v.* Tennessee, 101 U. S. 337.
[10] 134 U. S. 1. See also McGahey *v.* Virginia, 135 *id.* 662.

CHAPTER VI.

EX POST FACTO LAWS AND BILLS OF ATTAINDER.

77. The constitutional provisions.
78. The distinction between retrospective and *ex post facto* laws.
79. *Ex post facto* laws defined.
80. Illustrations of *ex post facto* laws.
81. Illustrations of laws which are not *ex post facto*.
82. Bills of attainder and bills of pains and penalties.

The constitutional provisions.

77. Section 10 of Article I of the Constitution declares that "no state shall . . . pass any bill of attainder or *ex post facto* law." Section 9 of Article I of the Constitution, restricting the powers of Congress, declares that "no bill of attainder or *ex post facto* law shall be passed."

The distinction between retrospective and ex post facto laws.

78. *Ex post facto* laws relate to criminal, and not to civil, procedure.[1] They are necessarily retrospective, but all retrospective laws are not *ex post facto*.[2] State laws which operate retrospectively, or which divest antecedently vested rights of property, are not prohibited by the Constitution of the United States, if they are not *ex post facto* laws, and if they do not impair the obligation of contracts.[3] A state legislature, unless restrained by the

[1] Calder *v.* Bull, 3 Dall. 386; Watson *v.* Mercer, 8 Pet. 88, 110; Carpenter *v.* Pennsylvania, 17 How. 456; League *v.* Texas, 184 U. S. 156.

[2] Calder *v.* Bull, 3 Dall. 386.

[3] Calder *v.* Bull, 3 Dall. 386; Fletcher *v.* Peck, 6 Cr. 138; Ogden *v.* Saunders, 12 Wheat. 266; Satterlee *v.* Matthewson, 2 Pet. 380; Watson *v.* Mercer, 8 Pet. 88, 110; Carpenter *v.* Pennsylvania, 17 How. 456; B. & S. R. *v.* Nesbit, 10 How. 395; Livingston *v.* Moore, 7 Pet. 469; League *v.* Texas, 184 U. S. 156.

constitution of the state, may, therefore, enact statutes setting aside a decree of a court of probate, refusing to allow probate of a will, and granting a rehearing by the court of probate with liberty of appeal therefrom, after the time limited by existing laws for an appeal has passed;[4] declaring that the relation of landlord and tenant exists between parties as to whom the courts of the state have decided that that relation does not exist;[5] curing defective acknowledgments of deeds by femes covert;[6] construing by a declaratory statute, after the death of a decedent, existing tax laws so as to subject to a collateral inheritance tax the distributive shares of non-resident distributees;[7] directing a county court to set aside an inquisition condemning certain land for the use of a railway and to order a new inquisition;[8] directing the imposition of a tax according to an assessment theretofore made;[9] authorizing the sale of lands on which the state has a lien for debts due to it;[10] and establishing new remedies for the collection of taxes already delinquent.[11] Upon the same principle, Congress having passed an act for the admission of a territory as a state, and having in that act omitted to provide for the disposal of causes pending in the Supreme Court of the United States on appeal from the territorial courts, may by a subsequent act properly make provision for such causes, for such legislation is remedial;[12] and it may provide for a review of the actions of a commission created by it, by a transfer

[4] Calder *v.* Bull, 3 Dall. 386.
[5] Satterlee *v.* Matthewson, 2 Pet. 380.
[6] Watson *v.* Mercer, 8 Pet. 88.
[7] Carpenter *v.* Pennsylvania, 17 How. 456.
[8] B. & S. R. *v.* Nesbit, 10 How. 395.
[9] Locke *v.* New Orleans, 4 Wall. 172.
[10] Livingston *v.* Moore, 7 Pet. 469.
[11] League *v.* Texas, 184 U. S. 156.
[12] Freeborn *v.* Smith, 2 Wall. 160.

of its proceedings and decisions to judicial tribunals for examination and determination *de novo*.[13] So also Congress may by statute impose a tax retrospectively.[14]

Ex post facto laws defined.

79. In Fletcher *v.* Peck,[15] Marshall, C. J., defines an *ex post facto* law to be one "which renders an act punishable in a manner in which it was not punishable when it was committed." In Cummings *v.* Missouri,[16] Field, J., defines an *ex post facto* law, as "one which imposes a punishment for an act which was not punishable at the time it was committed; or imposes additional punishment to that then prescribed; or changes the rules of evidence by which less or different testimony is sufficient to convict than was required." In Calder *v.* Bull,[17] Chase, J., classified *ex post facto* laws as follows:—"*first,* those that make an action, done before the passing of a law, and which was innocent when done, criminal, and punish such action; *second,* those that aggravate a crime, or make it greater than it was when committed; *third,* those that change the punishment and inflict greater punishment than the law annexed to the crime when committed; and, *fourth,* those that alter the legal rules of evidence and receive less or different testimony to convict the offender than that required at the time of the commission of the offense." That classification has been repeatedly quoted with approval.[18]

[13] Stephens *v.* Cherokee Nation, 174 U. S. 445.

[14] Stockdale *v.* I. Cos., 20 Wall. 323.

[15] 6 Cr. 138.

[16] 4 Wall. 325.

[17] 3 Dall. 386.

[18] Kring *v.* Missouri, 107 U. S. 221; Duncan *v.* Missouri, 152 *id.* 377; Gibson *v.* Mississippi, 162 *id.* 565; Mallett *v.* North Carolina, 181 *id.* 589.

Illustrations of ex post facto laws.

80. Laws have been held to be *ex post facto,* which, after the commission of an act, alter the situation of the accused to his disadvantage, as, for instance, by providing that the plea of *autrefois convict* should not at a second trial be a defense in the case of a prisoner convicted of murder in the second degree under an indictment charging murder in the first degree, the law having been at the time of the commission of the crime that such a plea was a defense;[19] or by requiring a clergyman,[20] or a lawyer,[21] as a condition precedent to the practice of his profession, to take an oath that he has not done an act, for the doing of which, when done, deprivation of office was not a legal penalty; or by requiring one who applies to a court to open a judgment rendered against him *in absentia,* to take oath, as a condition precedent to his obtaining the desired relief, that he has not done an act for the doing of which the deprivation of the right to sue in courts of justice was not by law antecedently imposed as a penalty;[22] or by adding to the death penalty for murders already committed, the withholding from the convict of all knowledge as to the date of his execution and the keeping of him in solitary confinement until that time;[23] or by reducing from twelve to eight the number of jurors necessary for the trial of felonies committed before the enactment of the law.[24] In the case last cited it was pointed out that while, as a general rule, the accused has no vested rights in particular modes of procedure, yet he cannot be deprived of any right that was regarded, at the time of the adoption

[19] Kring *v.* Missouri, 107 U. S. 221.

[20] Cummings *v.* Missouri, 4 Wall. 277.

[21] *Ex parte* Garland, 4 Wall. 333. But see Hawker *v.* New York, 170 U. S. 189.

[22] Pierce *v.* Carskadon, 16 Wall. 234.

[23] Medley, Petitioner, 134 U. S. 160.

[24] Thompson *v.* Utah, 170 U. S. 343.

of the Constitution, as vital for the protection of life and liberty, and which he enjoyed at the time of the commission of the offense charged against him.[25] So also, Congress cannot provide, by statute, that an act, which is not an offense against the law at the time of its doing, may become such by a subsequent independent act with which it has no necessary connection; as, for instance, that subsequent bankruptcy, either voluntary or involuntary, shall render criminal and punishable by imprisonment the obtaining of goods with intent to defraud at any time within three months before the commission of the act of bankruptcy.[26]

Illustrations of laws which are not ex post facto.

81. On the other hand, a law changing the *venue* in a criminal case, though passed subsequently to the commission of the offense, is not *ex post facto;*[27] nor is a law open to that objection, which, though passed after the commission of an offense, requires that the persons selected for jury service shall possess good intelligence, sound judgment and fair character,[28] or which enlarges the class of persons who may be competent to testify as witnesses at the trial, as, for instance, by repealing a statutory prohibition of the admission of the testimony of convicted felons,[29] or which provides that "comparison of a disputed writing with any writing proved to the satisfaction of the judge to be genuine, shall be permitted to be made by witnesses, and such writings and the evidence of witnesses respecting the same may be submitted to the court and jury as evidence of the genuineness or otherwise of the

[25] P. 352.
[26] U. S. *v.* Fox, 95 U. S. 670.
[27] Gut *v.* The State, 9 Wall. 35; Cook *v.* U. S., 138 U. S. 157.
[28] Gibson *v.* Mississippi, 162 U. S. 565.
[29] Hopt *v.* Utah, 110 U. S. 574.

writing in dispute,"[30] or which allows to the prosecution an appeal from the superior to the supreme court of the state,[31] or which lessens the number of judges in the appellate court,[32] or which limits the number of spectators at executions for murder;[33] nor is a law *ex post facto* which denies the exercise of the right of franchise to bigamists, or polygamists, for "the disfranchisement operates upon the existing state and condition of the person, and not upon a past offense;"[34] nor is a law unconstitutional which prohibits the continuance of the practice of medicine by those who do not register themselves in accordance with its provisions,[35] or which excludes from the practice of medicine those who have been convicted of felonies prior to its enactment;[36] nor can constitutional objection be raised to a law which provides that whoever has been twice convicted of crime shall, upon conviction of a felony committed after the passage of the act, be deemed to be an habitual criminal, and be punished by imprisonment for twenty-five years.[37] While a law which endeavors to reach acts already committed and which provides a like punishment for the same act in the future is void in so far as it is retrospective, it is, however, valid as to offenses which are committed after its passage.[38]

Bills of attainder and bills of pains and penalties.

82. A bill of attainder is defined by Field, J., in Cummings *v.* Missouri,[39] as "a legislative act which inflicts

[30] Thompson *v.* Missouri, 171 U. S. 380.
[31] Mallett *v.* North Carolina, 181 U. S. 589.
[32] Duncan *v.* Missouri, 152 U. S. 377.
[33] Holden *v.* Minnesota, 137 U. S. 483.
[34] Murphy *v.* Ramsey, 114 U. S. 15.
[35] Reetz *v.* Michigan, 188 U. S. 505.
[36] Hawker *v.* New York, 170 U. S. 189.
[37] McDonald *v.* Massachusetts, 180 U. S. 311.
[38] Jaehne *v.* New York, 128 U. S. 189.
[39] 4 Wall. 323.

punishment without a judicial trial," and he adds, "If the punishment be less than death, the act is termed a bill of pains and penalties. Within the meaning of the Constitution, bills of attainder include bills of pains and penalties." It has been held that a state constitution requiring clergymen, as a condition precedent to the exercise of their profession, to take oath that they had not committed certain designated acts, some of which were at the time offenses subject to legal penalties, and others of which were innocent acts,[40] and that a state statute requiring one who applied to a court to open a judgment rendered against him *in absentia,* to take oath that he had not committed certain designated public offenses,[41] and that an act of Congress requiring a lawyer, as a condition precedent to the exercise of his profession, to take an oath that he had not voluntarily borne arms against the United States, etc., [42] constituted in each case a bill of pains and penalties and was, therefore, subject to the constitutional prohibition against bills of attainder, inasmuch as, by legislative action, and without judicial investigation, the statute imposed a punishment for an act done before the enactment of the statute, the oath being offered to the party incriminated as a means of compelling an admission of guilt.

[40] Cummings *v.* Missouri, 4 Wall. 277.
[41] Pierce *v.* Carskadon, 16 Wall. 234.
[42] *Ex parte* Garland, 4 Wall. 333.

CHAPTER VII.

THE PROHIBITION OF STATE BILLS OF CREDIT.

83. Bills of credit defined.
84. What are, and what are not, bills of credit.

Bills of credit defined.

83. Section 10 of Article I of the Constitution declares that "no state shall . . . emit bills of credit." Bills of credit within the meaning of this constitutional provision are promissory notes issued by a state government on its credit "intended to circulate throughout the community for its ordinary purposes as money," and redeemable on demand, or at a day certain in the future.[1]

What are, and what are not, bills of credit.

84. A state, therefore, may not issue interest-bearing certificates in denominations "not exceeding $10, nor less than 50 cents" receivable by the state in payment of taxes, and of debts due to the state, and payable to officers of the state in discharge of salaries and fees of office, and redeemable by the state under an arrangement that there shall be withdrawn "annually from circulation one-tenth part of the certificates."[2] Nevertheless, a state may incorporate a bank, of which that state shall be the sole shareholder, and it may authorize that bank to issue notes as circulation, without contravening the constitutional prohibition, the distinction being that such notes are issued, not on the credit of the state, but on the credit of

[1] Craig *v.* Missouri, 4 Pet. 411; Byrne *v.* Missouri, 8 *id.* 40; Briscoe *v.* Bank of Kentucky, 11 *id.* 257.

[2] Craig *v.* Missouri, 4 Pet. 410; Byrne *v.* Missouri, 8 *id.* 40.

the capital and assets of the bank.[3] Coupons of state bonds, though negotiable and receivable for taxes due to the state,[4] and warrants drawn in payment of appropriations made by the legislature, payable upon presentation if there be funds in the treasury, and issued to individuals in payment of debts due to them,[5] cannot properly be called bills of credit, for they are not intended to circulate as money.

[3] Briscoe *v.* Bank of Kentucky, 11 Pet. 257; Darrington *v.* The Bank of Alabama, 13 How. 12.

[4] Virginia Coupons Case, 114 U. S. 269, 284.

[5] H. & T. C. R. *v.* Texas, 177 U. S. 66, 89.

CHAPTER VIII.

STATE COMPACTS.

85. What compacts are permitted, and what are forbidden.

What compacts are permitted, and what are forbidden.

85. Section 10 of Article I of the Constitution declares that "no state shall enter into any treaty, alliance, or confederation. . . . No state shall, without the consent of Congress, . . . enter into any agreement or compact with another state." This constitutional prohibition forbids compacts between a state and foreign nations, and also compacts between states of the United States, to which the assent of Congress has not been given. It is, therefore, decisive against the validity of the confederation entered into by the insurgent states in 1861.[1] It also forbids a governor of a state to enter into an agreement with a foreign government for the extradition of a prisoner.[2] But states may, with the consent of Congress, enter into agreements touching conflicting boundaries,[3] and, in such cases, the consent of Congress does not necessarily have to be given by congressional legislation expressly assenting to each of the stipulations of the agreement between the states, but that consent may be inferred from the legislation of Congress touching the

[1] Williams *v.* Bruffy, 96 U. S. 176; Sprott *v.* U. S., 20 Wall. 459; Ford *v.* Surget, 97 U. S. 594; U. S. *v.* Keehler, 9 Wall. 83.

[2] Holmes *v.* Jennison, 14 Pet. 540.

[3] Rhode Island *v.* Massachusetts, 12 Pet. 724; Missouri *v.* Iowa, 7 How. 660; Florida *v.* Georgia, 17 *id.* 478; Alabama *v.* Georgia, 23 *id.* 505; Virginia *v.* West Virginia, 11 Wall. 39; Poole *v.* Fleeger, 11 Pet. 185.

subject-matter of the agreement.[4] The prohibition of state compacts does not invalidate agreements entered into before the adoption of the Constitution.[5]

[4] Virginia *v.* West Virginia, 11 Wall. 39; Virginia *v.* Tennessee, 148 U. S. 503; *cf.* St. L. & S. F. Ry. *v.* James, 161 *id.* 545, 562.

[5] Wharton *v.* Wise, 153 U. S. 155.

CHAPTER IX.

FUGITIVES FROM JUSTICE.

86. The constitutional provision.
87. The concurrent jurisdiction of the federal and state courts.

The constitutional provision.

86. Section 2 of Article IV of the Constitution declares that "a person charged in any state with treason, felony, or other crime, who shall flee from justice and be found in another state, shall on demand of the executive authority of the state from which he fled, be delivered up, to be removed to the state having jurisdiction of the crime." The words "treason, felony, or other crime," as Taney, C. J., said in Kentucky *v.* Dennison,[1] "in their plain and obvious import, as well as in their legal and technical sense, embrace every act forbidden and made punishable by a law of the state. The word 'crime' of itself includes every offense, from the highest to the lowest in the grade of offenses, and includes what are called 'misdemeanors,' as well as treason and felony."[2] This constitutional provision imposes on the executive of the state in which the fugitive has taken refuge the duty of surrendering the fugitive upon demand made by the executive of the state from which the fugitive has fled, and upon proof made that he has been legally charged with crime, and this duty has been recognized by the act of Congress of 12th February, 1793,[3] but if the governor of the state to which the fugitive has fled refuses to deliver him up to justice,

[1] 24 How. 99.
[2] See also *Ex parte* Reggel, 114 U. S. 642.
[3] 1 Stat. 302; Rev. Stat., secs. 5278, 5279.

"there is no power delegated to the general government, either through the judicial department or any other department, to use any coercive means to compel him."[4] The Supreme Court of the United States, therefore, will not issue a *mandamus* to compel the performance by a governor of a state of his constitutional duty of surrendering to another state a fugitive from the justice of that state.[5] This provision of the Constitution does not give to the person extradited any constitutional right to insist that he shall not be tried for any offense other than that set forth in the requisition papers without first having an opportunity to return to the state from which he was extradited.[6] And a fugitive from justice who has been abducted from the state to which he fled may thereafter be tried in the state to which he has been forcibly carried, without violating any right or immunity secured to the accused by the Constitution of the United States.[7]

The concurrent jurisdiction of the federal and state courts.

87. An alleged fugitive from justice may petition a court of the United States for a writ of *habeas corpus* to inquire into the legality of his detention, but as the responsibility of determining whether or not the alleged fugitive from justice be in fact a fugitive from justice, rests upon the executive of the state to which the fugitive has fled, a court of the United States will not discharge the fugitive upon the hearing of the writ of *habeas corpus* because, in its judgment the proof that the prisoner is a fugitive from justice is, though satisfactory to the

[4] Per Taney, C. J., in Kentucky *v.* Dennison, 24 How. 109.
[5] Kentucky *v.* Dennison, 24 How. 66.
[6] Lascelles *v.* Georgia, 148 U. S. 537; *cf.* Cosgrove *v.* Winney, 174 *id.* 64.
[7] Mahon *v.* Justice, 127 U. S. 700.

executive, not as complete as might have been required.[8] When, however, it is shown conclusively that the accused was not within the state at the time the crime was committed, he will be discharged upon the hearing of the writ.[9] The alleged fugitive may also apply, by petition for a writ of *habeas corpus,* to a court of the state within which he is detained in custody of the purpose of being delivered to the justice of another state, for the jurisdiction of the courts of the United States over such petitions for writs of *habeas corpus* is not exclusive of the jurisdiction of the courts of the states in such cases, and the agent of the state demanding the surrender of the alleged fugitive is in no sense an officer of the United States, nor otherwise exempt from the process of the courts of the states.[10]

[8] *Ex parte* Reggel, 114 U. S. 642; Roberts *v.* Reilly, 116 *id.* 80; Whitten *v.* Tomlinson, 160 *id.* 231. See also Cook *v.* Hart, 146 *id.* 183; Pearce *v.* Texas, 155 *id.* 311.

[9] Hyatt *v.* People, 188 U. S. 691.

[10] Robb *v.* Connolly, 111 U. S. 624.

CHAPTER X.

THE JUDICIAL POWER.

88. The constitutional provisions.
89. The theory of a judicial system under the common law.
90. The necessity of a federal judiciary.
91. Cases in law and equity, etc.
92. Cases affecting ambassadors, etc.
93. Admiralty.
94. Controversies to which the United States shall be a party.
95. Controversies between citizens of different states.
96. Controversies between two or more states.
97. Controversies between a state and citizens of another state, etc.
98. Federal jurisdiction.
99. Exclusive and concurrent jurisdiction.
100. The courts of the United States.
101. Original jurisdiction.
102. Appellate and supervisory jurisdiction.
103. The necessity of a judicial "case."
104. The federal judiciary.
105. The federal supremacy.
106. Constitutional and statutory construction.
107. Judgments of courts.
108. Treaties.
109. The law administered in the federal courts.
110. Courts martial and impeachments.
111. The IV Amendment.
112. The V Amendment—(*a*) Due process of law; (*b*) Jeopardy, etc.
113. The VI Amendment.
114. The VII and VIII Amendments.
115. The XI Amendment.
116. The relations between the federal and state courts.
117. The XIV Amendment as affecting state judicial proceedings.
118. The "full faith and credit" clause.

The constitutional provisions.

88. Section 1 of Article III declares, that "the judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the Supreme and inferior courts, shall hold their offices

during good behaviour, and shall, at stated times, receive for their services a compensation, which shall not be diminished during their continuance in office." Section 2 declares that "the judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more states; between a state and citizens of another state; between citizens of different states; between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens, or subjects. In all cases affecting ambassadors, other public ministers, and consuls, and those in which a state shall be party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the Congress shall make. The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the state where the said crime shall have been committed; but when not committed within any state, the trial shall be at such place or places as the Congress may by law have directed."

Clause 2 of Article VI declares that "this Constitution and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding."

The IV Amendment declares that "the right of the peo-

ple to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The V Amendment provides that "no person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life and limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

The VI Amendment provides that "in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favour, and to have the assistance of counsel for his defense."

The VII Amendment provides that "in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law."

The VIII Amendment provides that "excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

The XI Amendment provides that "the judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state."

The theory of a judicial system under the common law.

89. Many of the men who, as members of the Convention of 1787, participated in the framing of the Constitution were lawyers, who had been trained in, and had mastered, the principles of the common law. When the Convention had determined that there should be a judicial department of the government of the United States, those lawyers naturally found in the common law the principles of administration which they deemed it wise to adopt. If they had been asked to formulate those principles they would have stated them substantially as follows:

It is the duty of every civilized government to provide tribunals for the punishment of crimes and for the final determination of private controversies between individuals. The accusation cannot be accepted as proof of the prisoner's guilt, nor can the statement of a claim by one individual against another be received as conclusive evidence of its validity. In each case there must be an inquiry by a tribunal before whom the respective parties can appear, to whom they can submit the evidence and the arguments on which they respectively rely, and who shall authoritatively decide the controversy.

There are certain requirements of justice so obviously true that they do not need to be vindicated by argument, and so essential to the liberty of the citizen that their presence or absence is, in itself, a conclusive test of the existence of free institutions. Those requirements are purity, impartiality, and intelligence of administration, with as much rapidity of operation as is consistent with

the attainment of a correct result. To that end every defendant who is accused of crime, or against whom a claim is attempted to be enforced by civil process, is entitled to an examination by an independent authority to determine, upon a *prima facie* presentation of the case and of the evidence supporting the charge, whether there should, or should not, be a trial; to due notice of the time and place of trial; to information of the precise charge against him; to a reasonable time in which to prepare his defense; to be confronted with the witnesses against him; to have full opportunity of testing, by cross-examination, the testimony of those witnesses; to have compulsory process for the production of witnesses on his behalf; and to be fully heard in his defense, at his option, either personally or by learned counsel of his own selection.

Every civil action and every criminal prosecution involve two questions: first, of fact; did the defendant do, or not do, the act with whose commission or omission he is charged? Second, of law; is that act forbidden, and if so, what is the nature of the remedy to be given to the plaintiff, or the punishment to be inflicted upon the defendant? It is clearly not necessary that these two questions should be determined at the same time, nor even by the same tribunal. On the contrary, it often is convenient to dispose of the question of law in the first instance. The defendant may say that, admitting for the sake of argument the fact that is charged against him, it yet does not constitute a subject of legal action against him. That preliminary question can then be determined, resulting, if in favour of the defendant, in the dismissal of the proceedings at that point, or, if adversely to him, settling the law as applicable to the facts, if they be found, upon subsequent inquiry, to be such as alleged against him. It is also clear that, while in either case the tribunal ought to act with integrity, and to that end must be guarded against corrup-

tion and the perturbing pressure of extraneous circumstances and undue influence brought to bear on behalf of either party, yet, as the question is of the one class or the other, different qualifications in the tribunal will be of greater, or less, importance in attaining a correct result. If the question be one of law, it is of chief importance that the tribunal have a competent knowledge of law, and possess that trained judicial discretion which will enable it to correctly construe statutes, and to estimate the relative weight and value of conflicting authorities and precedents. If, on the other hand, the question be one of fact, it is more important that the tribunal should be so constituted as to bring to bear upon the subject that experience which can only be gained in the pursuits of active life, and should take as nearly possible that plain common-sense view of the matter which the parties to the controversy would be likely to take if they were not biased by their interest in the result. It is certain that, as an aid to the correct determination of a question of fact, a knowledge of law is of no use, except in so far as the study of the law as a science has developed the mind and enlarged its powers, but any advantage from that source is more than counterbalanced by the tendency of studious and contemplative minds to substitute an imaginary world, peopled with fictitious beings and animated by artificial motives, for the real world in which we live, and, by the influence of professional, and especially judicial, training in the application of technical rules and in reasoning by analogy, to cause an undue subordination of fact to theory. This tribunal, as I have in general terms described it, is that which the common law, in its wisdom, has provided in its system of trial by jury. Wherever and whenever that system has been honestly and intelligently applied, it has not indeed been infallible in its determinations, nor has it achieved ideal justice, for it shares in that imperfection which is common to all insti-

tutions which are of human origin and operated by finite agencies, but it has in the vast majority of cases done substantial justice. Wherever and whenever that system has seemed to fail, it has so seemed because the judge has not been sufficiently learned and able, or because the jury has not been of average intelligence, or because the judge has not performed his proper functions, or has permitted the jury to disregard theirs.

If the judge who presides at the trial be intelligent, courageous, and of sufficient decision of character, he will, by the application of the rules of evidence, prevent the minds of the jury from being diverted from the true point of inquiry, he will submit questions to them only upon adequate proof, and he will, in his charge, put clearly and unmistakably before them the precise questions of fact which it is their province to determine, and by his instructions upon the law of the case, conveyed in clear terms, and laid down with firmness and decision, he will prevent them from being swayed by extraneous circumstances, and from misapprehending either the question in the case, the evidence relevant to it, or the rules of law controlling their decision. On the other hand, a judge, however honest in intention, who talks and does not listen, who yields to hasty and ill-considered views of the testimony of witnesses, who anticipates the arguments of counsel, who is vacillating and indecisive in his determinations upon questions of evidence, or who either does not take clear views of the law applicable to the case, or fails to impress upon the jury, with force and energy, the law which they must apply, is a serious obstruction to the administration of justice.

So also is it essential that the jurors be impartial, biased neither by relation to the parties, by interest in the result of the contest, nor by prejudice, and that they should be of at least average intelligence. There is no magic in the jury box to dissipate the mists of prejudice, nor to convert

ignorance into knowledge, nor stupidity into sense. Men of insufficient intelligence cannot be expected to decide correctly questions of fact, either simple or complicated.

There must also be a supervisory body to determine whether or not justice requires that the party against whom judgment shall have been given should have a new trial upon the facts, either because of error in the tribunal in its application of the law, or in its admission or rejection of evidence, or in deciding against the weight of the evidence, or because of the subsequent discovery of new evidence which, if produced at the trial and if believed by the tribunal of the first instance, ought, in justice, to have led to a different verdict.

There must also be an appellate tribunal, not to give the unsuccessful litigant a second chance, nor to retry the case upon the facts, but to review the record of the case and to set aside the judgment, if in its entry the principles of justice, or the rules of law, have been violated; or to remit the cause to the lower court for retrial, if that court shall be found to have erred in the admission or rejection of evidence, or if the evidence for the prosecution, taken as a whole, and assuming its truth, and drawing all the inferences that can be drawn from it, is legally insufficient to justify the judgment. It has been found in all civilized countries that an appellate tribunal is essential to the maintenance of uniformity in the administration of the law, and to the prevention of tyranny and caprice in the judges of the courts of first instance.

The necessity of a federal judiciary.

90. Having regard to the relation between the United States and the states, and bearing in mind that the United States cannot impose duties upon officers of the states, and compel the performance by those officers of the duties so

imposed,[1] it is, in an especial degree, essential that the United States should have the power of establishing courts of civil and criminal jurisdiction for the punishment of offenses against the laws of the United States, and for the protection and enforcement of rights created by the Constitution, laws, and treaties of the United States. It is also necessary to the enforcement of the declared supremacy of the Constitution, laws, and treaties of the United States, that a court constituted by the United States with jurisdiction co-extensive with the territory subject to the Constitution, should be, so far as regards all subjects of judicial cognizance, the final arbiter by whom the construction of the Constitution of the United States is to be authoritatively determined,[2] for otherwise the Constitution might have one meaning in one state, and a different meaning in another state, and it might be construed in one way in one court and in another way in another court,[3] and if the legislative, executive, and judicial departments of the several states were at liberty to conclusively determine for themselves the construction of that instrument, and the nature and the extent of the restraints upon freedom of state action imposed by it, those restraints would bind any one state only in so far as that state might choose to be bound at any particular time, and the inevitable result would be, as Marshall, C. J., said in Cohens *v.* Virginia,[4] to prostrate the federal "government and its laws at the feet of every state in the Union." The framers of the Constitution also deemed it necessary, in

[1] Prigg *v.* Pennsylvania, 16 Pet. 539; Kentucky *v.* Dennison, 24 How. 66.

[2] Cohens *v.* Virginia, 6 Wheat. 264; Bank of Hamilton *v.* Dudley's Lessee, 2 Pet. 492, 524; Dodge *v.* Woolsey, 18 How. 331, 347; Martin *v.* Hunter's Lessee, 1 Wheat. 304; Missouri *v.* Andriano, 138 U. S. 496; Connolly *v.* U. S. P. Co., 184 *id.* 540.

[3] Marbury *v.* Madison, 1 Cr. 137; Van Horne's Lessee *v.* Dorrance, 2 Dall. 304; The Mayor *v.* Cooper, 6 Wall. 247; Norton *v.* Shelby County, 118 U. S. 425.

[4] 6 Wheat. 385.

order to guard against possible prejudice in the courts of the states as affecting citizens of other states, when litigants in those courts, that every citizen of a state should, when suing a citizen of another state, have the option of bringing his action in the federal court within that other state, or in the court of the state, as might seem advisable to him.

The Constitution has, therefore, conferred upon the courts of the United States jurisdiction in two classes of causes, depending in the one class on the character of the cause, and in the other class on the character of the parties.[5]

Cases in law and equity, etc.

91. "Cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority" include all subject-matters of litigation, civil or criminal, whose determination requires the application or construction of the Constitution, laws, or treaties of the United States. A suit brought against a state by one of its own citizens cannot be maintained under this provision of the Constitution.[6] As Strong, J., said,[7] "A case consists of the right of one party, as well as of the other, and may truly be said to arise under the Constitution, or a law, or a treaty of the United States, whenever its correct decision depends upon the construction of either. Cases arising under the laws of the United States are such as grow out of the legislation of Congress, whenever they constitute the right, or privilege, or claim, or protection, or defense of the party, in whole or in part, by whom they are asserted." Fuller,

[5] Chisholm *v.* Georgia, 2 Dall. 419, 475; Cohens *v.* Virginia, 6 Wheat. 264, 378; Martin *v.* Hunter's Lessee, 1 Wheat. 304, 331, 343; The Moses Taylor, 4 Wall. 411, 429.

[6] Hans *v.* Louisiana, 134 U. S. 1.

[7] Tennessee *v.* Davis, 100 U. S. 257, 264.

C. J., has also said forcibly[8] that if in the cause, "it appears that some title, right, privilege, or immunity on which the recovery depends will be defeated by one construction of the Constitution or a law of the United States, or sustained by the opposite construction, then the case is one arising under the Constitution or laws of the United States."[9]

Cases affecting ambassadors, etc.

92. "Cases affecting ambassadors, other public ministers, and consuls" are cases to which such officers are parties, or so far privies, that the determination thereof will conclude their rights.[10]

Admiralty.

93. "Cases of admiralty and maritime jurisdiction" comprehend litigated cases with regard to acts done and

[8] Cooke *v.* Avery, 147 U. S. 375, 384.

[9] See also Cohens *v.* Virginia, 6 Wheat. 264, 379; Osborn *v.* Bank of the U. S., 9 *id.* 738, 824; The Mayor *v.* Cooper, 6 Wall. 247, 252; G.-W. & W. Co. *v.* Keyes, 96 U. S. 199, 201; R. Co. *v.* Mississippi, 102 *id.* 135, 140; Ames *v.* Kansas, 111 *id.* 449, 462; K. P. R. *v.* A., T. & S. F. R., 112 *id.* 414, 416; Provident Savings Society *v.* Ford, 114 *id.* 635; P. R. Removal Cases, 115 *id.* 1; Metcalf *v.* Watertown, 128 *id.* 586; Burthe *v.* Denis, 133 *id.* 514; Bock *v.* Perkins, 139 *id.* 628; Mitchell *v.* Smale, 140 *id.* 406; Cooke *v.* Avery, 147 *id.* 375; Belden *v.* Chase, 150 *id.* 674; N. P. R. *v.* Colburn, 164 *id.* 383; *In re* Lennon, 166 *id.* 548; A. Ex. Co. *v.* Michigan, 177 *id.* 404; W. U. T. Co. *v.* A. A. R., 178 *id.* 239; Lampasas *v.* Bell, 180 *id.* 276; Tullock *v.* Mulvane, 184 *id.* 497; Patton *v.* Brady, *ibid.* 608; Howard *v.* U. S., *ibid.* 676; V. W. Co. *v.* Vicksburg, 185 *id.* 65; Filhiol *v.* Maurice, *ibid.* 108; Talbot *v.* S. C. First Nat. Bank, *ibid.* 172; Swafford *v.* Templeton, *ibid.* 487; Marsh *v.* N., S. & Co., 140 *id.* 344; Holt *v.* I. Mfg. Co., 176 *id.* 68; Arkansas *v.* K. & T. C. Co., 183 *id.* 185; C. C. D. Co. *v.* Ohio, *ibid.* 238; N. F. & P. W. *v.* O. W. S. Co., *ibid.* 216; F.-G. L. S. Co. *v.* Springer, 185 *id.* 47; Kennard *v.* Nebraska, 186 *id.* 304; Sawyer *v.* Piper, 189 *id.* 154. For cases affecting officers of the United States see *In re* Neagle, 135 U. S. 1; Sonnentheil *v.* M. B. Co., 172 *id.* 401; Bausman *v.* Dixon, 173 *id.* 113; Auten *v.* U. S. Nat. Bank, 174 *id.* 125; Boske *v.* Comingore, 177 *id.* 459; Gableman *v.* P., D. & E. Ry., 179 *id.* 335. For cases affecting corporations created by the United States see N. P. R. *v.* Amato, 144 U. S. 465; T. & P. Ry. *v.* Cody, 166 *id.* 606.

[10] U. S. *v.* Ortega, 11 Wheat. 467; Blyew *v.* U. S., 13 Wall. 581.

rights created, or contracts to be performed, upon the high seas or inland navigable waters, or with regard to contracts for the transportation of passengers or goods on the high seas or on navigable waters between different states. The courts of the United States have, therefore, full jurisdiction in admiralty, and, as Bradley, J., said,[11] "the boundaries and limits of the admiralty and maritime jurisdiction are matters of judicial cognizance, and cannot be affected or controlled by legislation, whether state or national.[12] But within these boundaries and limits the law itself is that which has always been received as maritime law in this country, with such amendments and modifications as Congress may from time to time have adopted."

The judicial power, being defined by the Constitution, cannot be extended by legislation under the guise of a regulation of commerce, for the legislative regulation of any subject-matter of jurisdiction is in its nature essentially distinct from the creation of a tribunal and the vesting in that tribunal of jurisdiction over any particular subject-matter.[13] Congress may legislate as to maritime torts,[14] and maritime contracts. Ships navigating the high seas, though in the prosecution of commerce between two ports of the same state, are subject to the federal power of regulation, and may therefore have the benefit of the limitation of liability under the statutes of the United States,[15] and the limited liability statutes now extend to all vessels used in navigation of inland waters.[16] While states cannot create maritime liens, nor confer jurisdiction upon their courts for the enforcement of such

[11] *In re* Garnett, 141 U. S. 1, 14.

[12] The St. Lawrence, 1 Bl. 522, 6, 7; The Lottawanna, 21 Wall. 558, 575.

[13] The Genesee Chief *v.* Fitzhugh, 12 How. 443, 452.

[14] *In re* Garnett, 141 U. S. 1; Workman *v.* New York, 179 *id.* 552.

[15] Rev. Stat. Secs. 4283 and 4289; Lord *v.* G. N. & P. S. S. Co., 102 U. S. 541.

[16] Act of 19th June, 1886; 24 Stat. 80, 81; *In re* Garnett, 141 U. S. 1.

liens,[17] nor authorize their courts to entertain suits for damages for the breach of contracts for transportation of passengers on the high seas,[18] nor proceedings *in rem* in collision cases on navigable waters,[19] yet, as the general maritime law does not recognize liens in favour of material men for supplies furnished to vessels in their home ports, or for materials sold for ships in process of construction, the states may by statute authorize liens therefor, which may be enforced by proceedings *in rem* in the admiralty courts of the United States.[20] On the same principle, as both at common law and in admiralty the right of action for a tort is personal and dies with the person injured, and no action is maintainable therefor,[21] the right of action in such cases when conferred by a state statute is enforcible in a state court in a case of death caused by collision in navigable waters which are within the jurisdiction of the state, and it is also enforcible when the navigable waters are also within the admiralty jurisdiction of the United States[22] in the courts of the United States on the admiralty side,[23] and also on the law side.[24] In England navigable waters are, in law, only those in which the tide ebbs and flows; and, in that country, the admiralty jurisdiction is further restricted by the requirement that the *locus in quo,* though within the ebb and flow of the tide, should not be *infra corpus comitatus* nor at sea *infra fauces terræ.* In certain

[17] The Belfast, 7 Wall. 624; Moran *v.* Sturges, 154 U. S. 256; The Roanoke, 189 *id.* 185; The R. W. Parsons, 191 *id.* 17.

[18] The Moses Taylor, 4 Wall. 411.

[19] The Hine *v.* Trevor, 4 Wall. 555.

[20] Edwards *v.* Elliott, 21 Wall. 532; The Lottawanna, *ibid.* 558; The Kate, 164 U. S. 458; The R. W. Parsons, 191 *id.* 17.

[21] Higgins *v.* Butcher, Yelv. 89; *Ex parte* Gordon, 104 U. S. 515.

[22] S. Co. *v.* Chase, 16 Wall. 522; Sherlock *v.* Alling, 93 U. S. 99; Butler *v.* B. & S. S. Co., 130 *id.* 527.

[23] *Ex parte* Gordon, 104 U. S. 515; *Ex parte* Ferry Co., *ibid.* 519.

[24] Ry. Co. *v.* Whitton, 13 Wall. 270.

of the earlier cases in this country the English test of navigability in a legal sense was applied, but, as the reason of the rule failed here, and as its adoption would have taken out of the jurisdiction of admiralty the inland waters and many rivers which are in fact navigable but where there is no ebb or flow of the tide, the 9th section of the Judiciary Act of 1789 constituted navigability in fact the test of navigability in law, and the later cases have followed that statutory rule.[25]

Controversies to which the United States shall be a party.

94. The phrase "controversies to which the United States shall be a party" requires no elucidation further than to note that the United States, as a sovereignty, cannot be sued without its own consent,[26] and the constitutional provision does not impose upon Congress any duty to constitute tribunals to take cognizance of claims against the United States. Under this provision the United States may bring suit against a state in the Supreme Court of the United States, but, by reason of the state being a sovereignty, interest upon the principal found to be due by the state will not be awarded, unless its consent to pay interest has been given by its legislative, or executive, act.[27]

[25] The Genesee Chief *v.* Fitzhugh, 12 How. 443; Hobart *v.* Drogan, 10 Pet. 108; Waring *v.* Clarke, 5 How. 441; N. J. N. Co. *v.* Merchants' Bank, 6 *id.* 344; Fretz *v.* Bull, 12 *id.* 466; Allen *v.* Newberry, 21 *id.* 244; Maguire *v.* Card, *ibid.* 248; The St. Lawrence, 1 Bl. 522; The Moses Taylor, 4 Wall. 411; The Hine *v.* Trevor, *ibid.* 555; The Belfast, 7 *id.* 624; The Eagle, 8 *id.* 15; The Daniel Ball, 10 *id.* 557; The Montello, 20 *id.* 430; Butler *v.* B. & S. S. Co., 130 U. S. 527; Belden *v.* Chase, 150 *id.* 674; Moran *v.* Sturges, 154 *id.* 256; P. R. *v.* Napier S. Co., 166 *id.* 280; The Glide, 167 *id.* 606; Workman *v.* New York, 179 *id.* 552; The R. W. Parsons, 191 *id.* 17.

[26] McElrath *v.* U. S., 102 U. S. 426; Schillinger *v.* U. S., 155 *id.* 163; Belknap *v.* Schild, 161 *id.* 10; Stanley *v.* Schwalby, 162 *id.* 255; Ainsa *v.* U. S., 184 *id.* 639; Bigby *v.* U. S., 188 *id.* 400. See also 24 Stat. 505, c. 359.

[27] U. S. *v.* North Carolina, 136 U. S. 211. See U. S. *v.* Michigan, 190 *id.* 379.

Controversies between citizens of different states.

95. The phrase, controversies "between citizens of different states," vests in the courts of the United States jurisdiction over all proceedings *in personam* between such parties. As Marshall, C. J., said in Cohens *v.* Virginia,[28] "If these be the parties, it is entirely unimportant what may be the subject of controversy. Be it what it may, these parties have a constitutional right to come into the courts of the Union;" and as Field, J., said in Gaines *v.* Fuentes,[29] "It rests entirely with Congress to determine at what time the power may be invoked, and upon what conditions."[30]

A citizen of a territory, or of the District of Columbia, cannot sue under this clause,[31] nor can a state.[32] That jurisdiction which is dependent on the character of the parties does not include proceedings *in rem,* or *quasi in rem,* such as questions of probate,[33] or actions for divorce.[34]

[28] 6 Wheat. 378.

[29] 92 U. S. 10, 18.

[30] See also Payne *v.* Hook, 7 Wall. 425; Hyde *v.* Stone, 20 How. 170, 175; Ry. Co. *v.* Whitton, 13 Wall. 270, 287; Boom Co. *v.* Patterson, 98 U. S. 403; Dennick *v.* R. Co., 103 *id.* 11; *Ex parte* Boyd, 105 *id.* 647; Koenigsberger *v.* R. S. M. Co., 158 *id.* 41; St. L. & S. F. Ry. *v.* James, 161 *id.* 545; St. J. & G. I. R. *v.* Steele, 167 *id.* 659. The law applied in controversies between citizens of different states is discussed by Professor Pepper in "Borderland of Federal and State Decisions," and *infra,* sec. 109. And see Bucher *v.* C. R., 125 U. S. 555; Friedlander *v.* T. & P. Ry., 130 *id.* 416; Clark *v.* Bever, 139 *id.* 96; Scott *v.* Neely, 140 *id.* 106; Cross *v.* Allen, 141 *id.* 528; Ellenwood *v.* M. C. Co., 158 *id.* 105; H. F. I. Co. *v.* C., M. & St. P. Ry., 175 *id.* 91; Dooley *v.* Pease, 180 *id.* 126; W. U. T. Co.*v.* C. P. Co., 181 *id.* 92.

[31] Barney *v.* Baltimore, 6 Wall. 280; Cameron *v.* Hodges, 127 U. S. 322; Koenigsberger *v.* R. S. M. Co., 158 *id.* 41; Hooe *v.* Jamieson, 166 *id.* 395.

[32] P. T. C. Co. *v.* Alabama, 155 U. S. 482; Arkansas *v.* K. & T. C. Co., 183 *id.* 185; *cf.* M., K. & T. Ry. *v.* Missouri R. & W. Comrs., *ibid.* 53.

[33] Fouvergne *v.* New Orleans, 18 How. 470; Byers *v.* McAuley, 149 U. S. 608; Clarke *v.* Clarke, 178 *id.* 186; *cf.* Clark *v.* Bever, 139 *id.* 96; Hayes *v.* Pratt, 147 *id.* 557. See also Ellenwood *v.* M. C. Co., 158 *id.* 105; S. T. Co. *v.* B. R. Nat. Bank, 187 *id.* 211.

[34] Barber *v.* Barber, 21 How. 582.

Controversies between two or more states, etc.

96. The phrases "controversies between two or more states . . . between citizens of the same state claiming lands under grants of different states" seem to be unambiguous. The cases of suits between states have been mainly controversies as to conflicting boundaries,[35] and in these cases there is no doubt as to the jurisdiction. In 1790 it was assumed[36] that the courts had jurisdiction of a bill filed by one state against another state and grantees of that other state to enjoin ejectment suits by those grantees with regard to land, political jurisdiction over which was claimed by both states, but judgment was entered in favour of the defendant state on the ground that the plaintiff state had no property interest in the determination of the ejectment suits. It has since been held that a state cannot, upon an allegation of a violation of an interstate compact, enjoin another state and officers of the United States from diverting the water of a navigable river as a result of an improvement of navigation under congressional authority;[37] nor can a state in a suit against a municipality of another state, enjoin an improvement of navigation because of an apprehended diversion of trade from one of its municipalities to the defendant municipality;[38] nor can a state having assumed the collection of a debt due to one of its citizens by another state sue in its own name that other state;[39] nor can a state in an action

[35] New Jersey *v.* New York, 5 Pet. 284; Rhode Island *v.* Massachusetts, 12 *id.* 657, 724; Missouri *v.* Iowa, 7 How. 660; Florida *v.* Georgia, 11 *id.* 293, 17 *id.* 478; Alabama *v.* Georgia, 23 *id.* 505; Virginia *v.* West Virginia, 11 Wall. 39; Indiana *v.* Kentucky, 136 U. S. 479; Nebraska *v.* Iowa, 145 *id.* 519; Iowa *v.* Illinois, 147 *id.* 1; Virginia *v.* Tennessee, 148 *id.* 503; Tennessee *v.* Virginia, 177 *id.* 501.

[36] New York *v.* Connecticut, 4 Dall. 1.

[37] South Carolina *v.* Georgia, 93 U. S. 4.

[38] Wisconsin *v.* Duluth, 96 U. S. 379.

[39] New Hampshire *v.* Louisiana, 108 U. S. 76; *cf.* South Dakota *v.* North Carolina, 192 *id.* 286.

against a corporation organized under the laws of another state invoke the exercise of the original jurisdiction of the Supreme Court to compel the payment of a penalty for a violation of the law of the plaintiff state;[40] nor enjoin the enforcement of the laws of another state upon an allegation that those laws, if executed, will build up the commerce of cities of the defendant state to the injury of the commerce of the plaintiff state.[41] On the other hand, a state may invoke the original jurisdiction of the court by a bill against another state and a sanitary agency thereof to enjoin the discharge of sewage into a river flowing through the plaintiff state,[42] the ground of decision being that the relief prayed is the abatement of a nuisance injurious to the health of citizens of the plaintiff state, which can properly sue as *parens patriæ*. So also a bill may be filed by a state on behalf of her citizens, as well as in vindication of her rights as an individual owner, to restrain another state from depriving it of the waters of a river accustomed to flow through and across its territory, and the consequent destruction of the property of herself and her citizens, and injury to their health and comfort.[43] The original jurisdiction extends to a suit by a state as the donee of certain bonds issued by another state, and secured by a mortgage of railroad stock belonging to the latter state, to compel payment of the bonds and a subjection of the mortgaged property to the satisfaction of the debt.[44] And that jurisdiction also extends to an action by a state against an officer of the United States,

[40] Wisconsin *v.* P. I. Co., 127 U. S. 265.

[41] Louisiana *v.* Texas, 176 U. S. 1, 17, 18.

[42] Missouri *v.* Illinois, 180 U. S. 208; Fuller, C. J., and Harlan and White, JJ., dissented.

[43] Kansas *v.* Colorado, 185 U. S. 125.

[44] South Dakota *v.* North Carolina, 192 U. S. 286; White, J., Fuller, C. J., and McKenna and Day, JJ., dissented.

where the United States is the real party in interest adverse to the state.[45]

It has, however, been held that as the United States "has no power to impose on a state officer, as such, any duty whatever, and compel him to perform it," a state cannot, by a suit against the governor of another state, compel the performance of a "duty" by an officer of that other state, for "there is no power delegated to the general government, either through the judicial department, or any other department, to use any coercive means to compel him."[46] An Indian tribe within the United States, being a "domestic dependent nation," and not a state, cannot bring suit against a state under this clause of the Constitution.[47]

Controversies between a state and citizens of another state, etc.

97. The clauses of the constitutional provision, giving jurisdiction to the courts of the United States in "controversies . . . between a state and citizens of another state . . . and between a state or the citizens thereof, and foreign states, citizens, or subjects," were, at an early day in the history of the government, the subject of much controversy. There has never been much question as to the jurisdiction in causes in which a state was the plaintiff;[48] in such cases it has been denied only in an action to recover on a judgment for a penalty for a violation of municipal law,[49] and in actions in which it was necessary to join citizens of the plaintiff state as parties defendant;[50] but the jurisdiction was earnestly contested in cases in which

[45] Minnesota *v.* Hitchcock, 185 U. S. 373. See U. S. *v.* Michigan, 190 *id.* 396.

[46] Kentucky *v.* Dennison, 24 How. 66.

[47] The Cherokee Nation *v.* Georgia, 5 Pet. 1.

[48] Texas *v.* White, 7 Wall. 700.

[49] Wisconsin *v.* P. I. Co., 127 U. S. 265.

[50] California *v.* S. P. Co., 157 U. S. 229; Minnesota *v.* N. S. Co., 184 *id.* 199.

a state was defendant and citizens of other states were plaintiffs. In 1792 the Supreme Court of the United States, in Chisholm *v.* Georgia,[51] the cause being an action of assumpsit brought by a citizen of South Carolina against the state of Georgia, sustained the original jurisdiction of the Supreme Court in suits by a citizen of one state against another state. In consequence of that judgment, and for the purpose of relieving the states from liability to suits to enforce the payment of their obligations,[52] the XI Article of the Amendments to the Constitution was adopted.[53]

Federal jurisdiction.

98. The jurisdiction of the courts of the United States is, in its character, either civil or criminal, and, in its exercise, either exclusive of, or concurrent with, the jurisdiction of the courts of the states, and either original or appellate, *first,* by appeal from a federal court of original jurisdiction to a federal court of intermediate, and thence to the federal court of final, appeal; or *second,* by appeal directly from the federal court of original jurisdiction to the federal court of final appeal; or *third,* by appeal from a state court of last resort to the federal court of final appeal. The courts of the United States also exercise a supervisory jurisdiction, over the courts of the states by the removal therefrom, before trial, of certain causes of federal cognizance,[54] and a general supervisory jurisdiction which may be invoked by a petition for a writ of *habeas corpus,* whenever a person is in custody for an act done or omitted in pursuance of a law of the United States, or of an order, process, or decree of a court, or a judge

[51] 2 Dall. 419.
[52] Cohens *v.* Virginia, 6 Wheat. 406.
[53] *Infra,* Section 115.
[54] *Infra,* Section 102.

thereof, or is in custody in violation of the Constitution, or a law or treaty of the United States.[55]

As the courts of the United States are courts of limited jurisdiction, the record must show affirmatively that the cause is necessarily of federal cognizance, by reason of either the subject-matter of litigation,[56] or the character of the parties,[57] and this must be formally averred,[58] or distinctly appear on the face of the record.[59] If the jurisdictional fact does appear on the face of the record, it can only be traversed by a plea to the jurisdiction.[60] There is a conclusive presumption of law that a corporation and all its members are citizens of the state creating the corporation [61] and that a national bank is a citizen of the state within which it is located.[62]

[55] Rev. Stat., secs. 753, 761; *In re* Neagle, 135 U. S. 1; *In re* Loney, 134 *id.* 372; Medley, Petitioner, *ibid.* 160; *In re* Frederich, 149 *id.* 70; Ohio *v.* Thomas, 173 *id.* 276; Boske *v.* Comingore, 177 *id.* 459; *cf.* Storti *v.* Massachusetts, 183 *id.* 138.

[56] Lawler *v.* Walker, 14 How. 149; Osborn *v.* Bank of the United States, 9 Wheat. 738, 823; Mills *v.* Brown, 16 Pet. 525; R. Co. *v.* Rock, 4 Wall. 177, 180; Tennessee *v.* Union & Planters' Bank, 152 U. S. 454; Chappell *v.* Waterworth, 155 *id.* 102; P. T. C. Co. *v.* Alabama, *ibid.* 482; E. L. L. Co. *v.* Brown, *ibid.* 488; Sayward *v.* Denny, 158 *id.* 180; H. & T. C. R. *v.* Texas, 177 *id.* 66; W. U. T. Co. *v.* A. A. R., 178 *id.* 239; *cf.* K. W. P. Co. *v.* G. B. C. Co., 142 *id.* 254.

[57] Dred Scott *v.* Sandford, 19 How. 393; Bingham *v.* Cabot, 3 Dall. 382; Capron *v.* Van Noorden, 2 Cr. 126; Breithaupt *v.* Bank of Georgia, 1 Pet. 238; Brown *v.* Keene, 8 *id.* 112, 115; Hornthall *v.* The Collector, 9 Wall. 560; Godfrey *v.* Terry, 97 U. S. 171; Robertson *v.* Cease, *ibid.* 646; Grace *v.* A. C. I. Co., 109 *id.* 278, 283; Cameron *v.* Hodges, 127 *id.* 322; Chapman *v.* Barney, 129 *id.* 677; Stevens *v.* Nichols, 130 *id.* 230; Timmons *v.* E. L. Co., 139 *id.* 378; Denny *v.* Pironi, 141 *id.* 121; Mattingly *v.* N. W. V. R., 158 *id.* 53; I. C. & I. Co. *v.* Gibney, 160 *id.* 217; St. L. & S. F. Ry. *v.* James, 161 *id.* 545; Benjamin *v.* New Orleans, 169 *id.* 161.

[58] Montalet *v.* Murray, 4 Cr. 46.

[59] Jones *v.* Andrews, 10 Wall. 327; Godfrey *v.* Terry, 97 U. S. 171; Robertson *v.* Cease, *ibid.* 646. See also Arbuckle *v.* Blackburn, 191 *id.* 405; Minnesota *v.* N. S. Co., 194 *id.* 48.

[60] Wickliffe *v.* Owings, 17 How. 47.

[61] O. & M. R. *v.* Wheeler, 1 Bl. 286; B. & O. R. *v.* Harris, 12 Wall. 65; Ry. Co. *v.* Whitton, 13 *id.* 270; Muller *v.* Dows, 94 U. S. 444; St. L. & S. F. Ry. *v.* James, 161 *id.* 545; Blake *v.* McClung, 172 *id.* 239; S. Ry. *v.* Allison, 190 *id.* 326; *cf.* St. J. & G. I. R. *v.* Steele, 167 *id.* 659.

[62] Act 13th Aug., 1888, sec. 4, 25 Stat. 433.

Original process of the circuit and district courts does not run outside of the district in which the suit is brought.[63]

Where the jurisdiction depends on diverse citizenship, suit can be brought only in the district of the residence of either the plaintiff or defendant.[64]

An assignee of a chose in action cannot sue on the ground of diverse citizenship where his assignor could not sue, save in actions upon foreign bills of exchange and in actions against corporations.[65]

In causes of criminal cognizance, the original jurisdiction of the federal courts is limited in two respects. In the first place, those courts cannot take cognizance of an act alleged to be criminal, which has not been declared to be such by an act of Congress.[66] In the second place, Congress cannot, under the Constitution, declare an act to be criminal, unless, as Field, J., said,[67] that act has "some relation to the execution of a power of Congress, or to some matter within the jurisdiction of the United States." Thus, a murder committed on board a vessel of the navy of the United States while at anchor in navigable waters within the jurisdiction of a state is not cognizable in a court of the United States;[68] Congress cannot make it a misdemeanor to sell within the territory of a state illuminating oil inflammable at less than a specified temperature;[69] while Congress may legislate with regard to bankruptcy, and may prohibit and declare to be punishable the commission of a fraud in contemplation of bankruptcy, it cannot constitute the obtaining of goods on false pretences

[63] *Ibid.*, sec. 1.

[64] *Ibid.*, sec. 1.

[65] *Ibid.*, sec. 1.

[66] U. S. *v.* Hudson, 7 Cr. 32; U. S. *v.* Coolidge, 1 Wheat. 415; Bush *v.* Kentucky, 107 U. S. 110; Jones *v.* U. S., 137 *id.* 202, 211. But see Tennessee *v.* Davis, 100 *id.* 257.

[67] U. S. *v.* Fox., 95 U. S. 670.

[68] U. S. *v.* Bevans, 3 Wheat. 336.

[69] U. S. *v.* Dewitt, 9 Wall. 41.

with intent to defraud, but not in contemplation of bankruptcy, to be an offense against the United States;[70] and Congress cannot by statute provide for the punishment of state election officers for wrongully refusing to receive the vote of a qualified voter at an election, when that refusal is not based upon a discrimination against the voter on account of his race, colour, or previous condition of servitude.[71]

Exclusive and concurrent jurisdiction.

99. It is a principle of constitutional construction, as stated by Marshall, C. J., in Sturges *v.* Crowninshield,[72] that "whenever the terms in which a power is granted to Congress, or the nature of the power, require that it should be exercised exclusively by Congress, the subject is as completely taken from the state legislatures as if they had been expressly forbidden to act on it."[73] In conformity with this principle, it has been decided in Martin *v.* Hunter's Lessee,[74] and in The Moses Taylor,[75] that Congress has power to divest the courts of the states of jurisdiction over all subject-matters which are included within the constitutional grant of judicial power to the United States, or whose determination by the judicial power of the United States is necessary to the exercise by Congress of its constitutional power of legislation, and where Congress has expressed its will that, as to any particular subject-matter of federal cognizance the jurisdic-

[70] U. S. *v.* Fox, 95 U. S. 670.

[71] U. S. *v.* Reese, 92 U. S. 214; U. S. *v.* Cruikshank, *ibid.* 542.

[72] 4 Wheat. 193.

[73] See also Houston *v.* Moore, 5 Wheat. 1; Gilman *v.* Philadelphia, 3 Wall. 713, 730.

[74] 1 Wheat. 304.

[75] 4 Wall. 411. See also Cohens *v.* Virginia, 6 Wheat. 314, 315, 325; Slocum *v.* Mayberry, 2 *id.* 9; Gelston *v.* Hoyt, 3 *id.* 246; Waring *v.* Clarke, 5 How. 451; G., C. & S. F. Ry. *v.* Hefley, 158 U. S. 98. *Sed. cf.* Story's Commentaries, sec. 1672, *note* 4.

tion of the courts of the United States shall be exclusive, the courts of the states cannot take cognizance of such subject-matter.[76]

Of course, the Constitution, having granted the power, and not having commanded Congress to exercise it, it is for Congress to determine when and to what extent it will exercise it. Therefore, the jurisdiction of the courts of the United States within the limits imposed by the Constitution is either exclusive of, or concurrent with, that of the courts of the states, as Congress may, from time to time, determine.[77] As the law now is, the jurisdiction of the courts of the United States is exclusive of that of the states in cases of crimes and offenses cognizable under the authority of the United States; in suits for penalties and forfeitures incurred under the laws of the United States; in civil causes of admiralty and maritime jurisdiction, saving to suitors in all cases the right of a common-law remedy, where the comon law is competent to give it; in seizures under the laws of the United States on land or on waters not within admiralty and maritime jurisdiction; in cases arising under the patent right or copyright laws of the United States; in all matters and proceedings in

[76] In Claflin *v.* Houseman, 93 U. S. 130, Bradley, J., said, the general principle is, "that, where jurisdiction may be conferred on the United States courts, it may be made exclusive where not so by the Constitution itself; but, if exclusive jurisdiction be neither express nor implied, the state courts have concurrent jurisdiction whenever, by their own constitution, they are competent to take it." In Robertson *v.* Baldwin, 165 U. S. 275, Brown, J., said that the judicial power which the Constitution intended to confine to courts created by Congress "extends only to the trial and determination of 'cases' in courts of record, and Congress is still at liberty to authorize the judicial officers of the several states to exercise such power as is ordinarily given to officers of courts not of record; such, for instance, as the power to take affidavits, to arrest and commit for trial offenders against the laws of the United States, to naturalize aliens, and to perform such other duties as may be regarded as incidental to the judicial power rather than a part of the judicial power itself."

[77] Martin *v.* Hunter's Lessee, 1 Wheat. 304, 331, 333; The Moses Taylor, 4 Wall. 411, 429.

bankruptcy; in all controversies of a civil nature, where a state is a party, except between a state and its citizens, or between a state and citizens of other states, or aliens; and in all suits or proceedings against ambassadors, or other public ministers, or their domestics, or domestic servants, or against consuls or vice-consuls.[78]

The courts of the United States.

100. The courts of the United States are the district courts, the circuit courts, the circuit courts of appeal, and the Supreme Court. The jurisdiction of the district and circuit courts is exclusively original; that of the circuit courts of appeal exclusively appellate; and that of the Supreme Court both original and appellate. The United States is divided into judicial districts, in some cases one state constituting a judicial district, and, in other cases, a state including within its territory two or more districts. There are also a court of claims, a court of private land claims, and in certain foreign countries, consular courts, and in the territories and in Alaska, Hawaii, Porto Rico, and the Philippines, territorial courts, whose jurisdiction and procedure are foreign to the subject of this book. There is for each district court one judge, who is required by statute to reside within his district.

There are nine circuit courts, the United States being divided into nine circuits, each circuit including the districts in three, or more, states. For each circuit there are two, or more, circuit judges, and in addition thereto, the justice of the Supreme Court allotted to that circuit. The circuit courts have no longer any appellate jurisdiction.[79]

In each circuit there is a circuit court of appeals, constituted at any one time of three judges, of whom two are

[78] Rev. Stat., sec. 711.

[79] Act 3d Mar., 1891, c. 517, sec. 4, 26 Stat. 826.

a quorum.[80] The judges therein are the Supreme Court justice assigned to the circuit, the circuit judges, and the several district judges thereof. The Supreme Court now consists of a chief justice and eight associate justices, any six of whom constitute a quorum; but Congress may increase, or decrease, the number of justices, or change the quorum.

Original jurisdiction.

101. The original jurisdiction of the courts of the United States is exercised in some cases by the Supreme Court, and, in other cases, by the inferior courts. As Johnson, J., said in United States *v.* Hudson,[81] "Only the Supreme Court possesses jurisdiction derived immediately from the Constitution, and of which the legislative power cannot deprive it. All other courts created by the general government possess no jurisdiction but what is given them by the power that creates them, and can be vested with none but what the power ceded to the general government will authorize them to confer."

The original jurisdiction of the Supreme Court is limited by the Constitution to "cases affecting ambassadors, other public ministers, and consuls, and those in which a state shall be party." Congress cannot confer upon the Supreme Court any original jurisdiction other than that so conferred by the express terms of the Constitution.[82] Whether or not Congress can authorize other courts of the United States to exercise concurrent original jurisdiction in the cases, original jurisdiction over which is vested by the Constitution in the Supreme Court, was for a long time an unsettled question. In U. S. *v.* Ortega,[83]

[80] Act 3d Mar., 1891, c. 517, 26 Stat. 826.
[81] 7 Cr. 32.
[82] Marbury *v.* Madison, 1 Cr. 137.
[83] 11 Wheat. 467.

the question was raised, but not decided, but in Börs *v.* Preston,[84] it was determined, that the Congress might confer a concurrent original jurisdiction upon the circuit courts of the United States in actions against consuls of foreign states.[85] The Supreme Court may also issue writs of prohibition to the admiralty courts,[86] and writs of mandamus [87] "in cases warranted by the principles and usages of law." [88]

The original jurisdiction of the subordinate courts of the United States, excepting the circuit courts of appeal, which have no original jurisdiction,[89] is, in the main, as follows:

On the civil side, the circuit courts have original jurisdiction, concurrent with the courts of the states, of all suits at common law, or in equity, where the matter in dispute, exclusive of interest and costs, exceeds two thousand dollars, first, where the controversy arises under the Constitution, laws, or treaties of the United States; second, where the controversy is between citizens of different states, or between citizens of a state and foreign states, citizens, or subjects; third, where the controversy is between citizens of the same state claiming land under grants of different states; and, fourth, where the United States are plaintiffs.[90] The circuit courts also have jurisdiction, without pecuniary limitation, of all suits under internal revenue and postal laws; [91] of all suits for penalties under laws regulating the carriage of passengers in merchant ves-

[84] 111 U. S. 252.

[85] Rev. Stat., sec. 687. See also Ames *v.* Kansas, 111 U. S. 449; P. T. C. Co. *v.* Alabama, 155 *id.* 482. But see Curtis's Jurisdiction of the Courts of the U. S., p. 10.

[86] U. S. *v.* Peters, 3 Dall. 121.

[87] Hayburn's Case, 2 Dall. 409.

[88] Rev. Stat., sec. 688.

[89] See Act 3d Mar., 1891, c. 517, 26 Stat. 826.

[90] Act 13th Aug., 1888, c. 866, 25 Stat. 433.

[91] Rev. Stat., sec. 629.

sels;[92] of patent,[93] copyright,[94] and trade-mark[95] cases; of winding-up suits against national banks;[96] and of suits to recover damages for injuries to the person or property under revenue laws.[97]

The circuit courts also have original jurisdiction under the Anti-trust Act of 1890,[98] and under the Interstate Commerce Act[99] and in customs cases.[100]

The circuit courts also have original jurisdiction, concurrent with the court of claims, of all claims against the United States, when the matter in dispute, exclusive of costs, exceeds one thousand dollars and does not exceed ten thousand dollars.[1]

The circuit courts have also, on the criminal side, exclusive cognizance of all crimes and offenses made such by the statutes of the United States, except where otherwise provided by law, and concurrent jurisdiction with the district courts of crimes and offenses cognizable therein.[2]

The district courts have original jurisdiction of all crimes and offenses made such by the statutes of the United States when committed within their respective districts, or upon the high seas, and the punishment of which is not capital; and on the civil side, of all suits for penalties and forfeitures; of all suits at common law brought by the United States, or by any officer thereof, authorized by law to sue; of all suits in equity to enforce liens, etc., under the

[92] Rev. Stat., sec. 629.

[93] Rev. Stat., sec. 629; Act 3d Mar., 1897, c. 395, 29 Stat. 695.

[94] Rev. Stat., sec. 629; Act 6th Jan., 1897, c. 4, 29 Stat. 481.

[95] Act 3d Mar., 1881, c. 138, 21 Stat. 502.

[96] Act 13th Aug., 1888, c. 866, sec. 4, 25 Stat. 436, amending Rev. Stat., sec. 629.

[97] Rev. Stat., sec. 629.

[98] Act 2d July, 1890, c. 647, 26 Stat. 209.

[99] Acts 4th Feb., 1887, c. 104, sec. 16, 24 Stat. 384; 2d March, 1889, c. 382, sec. 5, 25 Stat. 855.

[100] Under sec. 15 of the Act of 10th June, 1890, c. 407, 26 Stat. 131.

[1] Act 3d Mar., 1887, c. 359, sec. 2, 24 Stat. 505.

[2] Act 13th Aug., 1888, c. 866, 25 Stat. 433.

internal revenue statutes; of suits for the recovery of forfeitures or damages due to the United States; of all causes of action under the postal laws; of admiralty causes, saving to suitors their common-law remedies, if any; and of all litigation in bankruptcy.[3] The district courts have also concurrent jurisdiction with the court of claims in claims against the United States when the matter in dispute does not exceed one thousand dollars.[4]

The court of claims has original jurisdiction of claims against the United States, and of set-offs against the claims sued on.[5]

Appellate and supervisory jurisdiction.

102. As the Constitution has declared that in all cases, other than those in which original jurisdiction has been by its terms vested in the Supreme Court, that court "shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the Congress shall make," Congress may define and limit the appellate jurisdiction of the Supreme Court,[6] but the Supreme Court cannot be required to review the actions of officers of the United States under legislative or executive references.[7] In the exercise of its appellate jurisdiction the Supreme Court of the United States may review the final judgments and decrees of the inferior courts of the United States under the restrictions stated in the acts of Congress,[8] and it may review the final judgments or decrees of the courts of last resort of the states in causes either

[3] Rev. Stat., sec. 563.

[4] Act 3d Mar., 1887, c. 359, sec. 2, 24 Stat. 505.

[5] Rev. Stat., sec. 1059 *et seq.*

[6] Wiscart *v.* Dauchy, 3 Dall. 321; Durousseau *v.* U. S., 6 Cr. 307, 314; The Francis Wright, 105 U. S. 381; L. & G. W. S. Co. *v.* P. I. Co., 129 *id.* 397.

[7] Hayburn's Case, 2 Dall. 409; Hunt *v.* Palao, 4 How. 589; McNulty *v.* Batty, 10 *id.* 72; U. S. *v.* Ferreira, 13 *id.* 40; Gordon *v.* U. S., 2 Wall. 561. See also language of Taney, C. J., in appendix to 117 U. S.

[8] Rev. Stat., sec. 690 *et seq.*

civil or criminal, "where is drawn in question the validity of a statute of, or an authority exercised under any state, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favour of their validity; or where any title, right, privilege, or immunity is claimed under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States, and the decision is against the title, right, privilege, or immunity specially set up or claimed by either party, under such Constitution, treaty, statute, commission, or authority."[9] But even though the state court of last resort passes upon a question federal in its nature, if the decision also involves an independent ground sufficiently broad to sustain the judgment, that decision cannot be questioned in the Supreme Court.[10] The courts of the United States also exercise a supervisory jurisdiction over the courts of the states by a removal from a court of a state to a federal court of a cause, either civil or criminal, depending but

[9] Rev. Stat., sec. 709. See also Cohens *v.* Virginia, 6 Wheat. 264; Worcester *v.* Georgia, 6 Pet. 515; Twitchell *v.* The Commonwealth, 7 Wall. 321; Spies *v.* Illinois, 123 U. S. 131; Burthe *v.* Denis, 133 *id.* 514; Missouri *v.* Andriano, 138 *id.* 496; Etheridge *v.* Sperry, 139 *id.* 266; Williams *v.* Heard, 140 *id.* 529; Metropolitan Bank *v.* Claggett, 141 *id.* 520; Boyd *v.* Nebraska, 143 *id.* 135; Roby *v.* Colehour, 146 *id.* 153; Sayward *v.* Denny, 158 *id.* 180; C. & N. W. Ry. *v.* Chicago, 164 *id.* 454; Dewey *v.* Des Moines, 173 *id.* 193; Scudder *v.* Comptroller, 175 *id.* 32; Boske *v.* Comingore, 177 *id.* 459; Rothschild *v.* Knight, 184 *id.* 334; M. L. I. Co. *v.* McGrew, 188 *id.* 291; Hooker *v.* Los Angeles, *ibid.* 314; N. M. B. & L. Assn. *v.* Brahan, 193 *id.* 635; *cf.* Moran *v.* Horsky, 178 *id.* 205; Y. & M. V. Ry. *v.* Adams, 180 *id.* 1.

[10] De Saussure *v.* Gaillard, 127 U. S. 216; Hale *v.* Akers, 132 *id.* 554; Hopkins *v.* McLure, 133 *id.* 380; Beatty *v.* Benton, 135 *id.* 244; Johnson *v.* Risk, 137 *id.* 300; Cook County *v.* C. & C. C. & D. Co., 138 *id.* 635; Hammond *v.* Johnston, 142 *id.* 73; Eustis *v.* Bolles, 150 *id.* 361; R. R. *v.* C. V. R., 159 *id.* 630; Seneca Nation *v.* Christy, 162 *id.* 283; Allen *v.* S. P. R., 173 *id.* 479; Seeberger *v.* McCormick, 175 *id.* 274; Moran *v.* Horsky, 178 *id.* 205; Hale *v.* Lewis, 181 *id.* 473; Howard *v.* Fleming, 191 *id.* 126. See also Dreyer *v.* Illinois, 187 *id.* 71.

not yet finally adjudicated in the state court,[11] or by the issue of a writ of *habeas corpus* in cases of a restraint of personal liberty under process of a court of a state, void by reason of the offense with which the prisoner is charged being a matter of federal, and not of state, cognizance, or by reason of the restraint of a prisoner in violation of the Constitution, or of any treaty, or law of the United States.[12] The right of appeal, or of removal, or to the writ of *habeas corpus,* is in any case dependent, not only on the federal character of the question involved, or the right of the party to sue in the federal court, but also on the terms of the act of Congress authorizing the exercise by the court of the United States of its supervisory jurisdiction in the particular case. The Constitution does not expressly authorize the removal of causes of federal cognizance from the courts of the states to the courts of the United States before final judgment, nor does it expressly authorize the review of such causes in the Supreme Court of the United States after the entry of final judment in a court of a state, nor does it expressly authorize the release by a court of the United States after a hearing on

[11] West *v.* Aurora City, 6 Wall. 139; Philadelphia *v.* The Collector, 5 *id.* 720; The Mayor *v.* Cooper, 6 *id.* 247; Tennessee *v.* Davis, 100 U. S. 257; Removal Cases, *ibid.* 457; Ames *v.* Kansas, 111 *id.* 449; Young *v.* Parker, 132 *id.* 267; Bock *v.* Perkins, 139 *id.* 628; Marshall *v.* Holmes, 141 *id.* 589; Martin *v.* B. & O. R., 151 *id.* 673; *cf.* Brown *v.* Trousdale, 138 *id.* 389; Bellaire *v.* B. & O. R., 146 *id.* 117; Chappell *v.* Waterworth, 155 *id.* 102; E. L. L. Co. *v.* Brown, *ibid.* 488; Arkansas *v.* K. & T. C. Co., 183 *id.* 185.

[12] *In re* Loney, 134 U. S. 372; Medley, Petitioner, *ibid.* 160; *In re* Neagle, 135 *id.* 1; *In re* Frederich, 149 *id.* 70; Ohio *v.* Thomas, 173 *id.* 276; Boske *v.* Comingore, 177 *id.* 459; *cf.* Storti *v.* Massachusetts, 183 *id.* 138. But ordinarily the writ issues only when the court under whose warrant the petitioner is held is without jurisdiction. *In re* Duncan, 139 U. S. 449; Whitten *v.* Tomlinson, 160 *id.* 231; Crossley *v.* California, 168 *id.* 640; Baker *v.* Grice, 169 *id.* 284; Tinsley *v.* Anderson, 171 *id.* 101; Harkrader *v.* Wadley, 172 *id.* 148; Markuson *v.* Boucher, 175 *id.* 184; Davis *v.* Burke, 179 *id.* 399; Minnesota *v.* Brundage, 180 *id.* 499. See also U. S. *v.* Sing Tuck, 194 *id.* 161; *cf. Ex parte* Royall, 117 *id.* 241, 252; New York *v.* Eno, 155 *id.* 89; Rev. Stat., sec. 751 *et seq.*

habeas corpus of a prisoner indicted in a state court for doing that which under the Constitution and laws of the United States he may rightfully do, but the right of removal, the right of appeal, and the right to a discharge after hearing on *habeas corpus,* alike result from the constitutional declaration of the supremacy of the Constitution and laws of the United States.

The circuit courts have no appellate jurisdiction.[13]

The appellate jurisdiction of each circuit court of appeals is exercised by appeal or by writ of error from the district and circuit courts within its circuit, and from territorial courts attached by statute to its circuit, in all cases other than those in which the Supreme Court has direct appellate jurisdiction,[14] and the judgments or decrees of each circuit court of appeal are final in all cases in which the jurisdiction is dependent exclusively upon diverse citizenship; and in all patent, revenue, and admiralty causes, and in all prosecutions not directly appealable from the district, or circuit, courts to the Supreme Court; excepting that upon every subject within its appellate jurisdiction, a circuit court of appeals may certify to the Supreme Court of the United States any question of law concerning which the circuit court of appeals desires the instruction of the Supreme Court for a proper decision; and excepting also that the Supreme Court may, in any case, require a circuit court of appeals to certify any case for final review and determination.[15]

The appeals or writs of error may be taken from the circuit court of appeals to the Supreme Court in all cases in which the judgment or decree of the circuit court of appeals is not made final by statute; and appeals or writs of error may be taken directly from the district and circuit

[13] Act 3d Mar., 1891, c. 517, sec. 4, 26 Stat. 826.
[14] *Ibid.,* sec. 5.
[15] *Ibid.,* sec. 6.

courts to the Supreme Court from final sentences and decrees in prize causes; in cases of conviction of a capital or otherwise infamous crime; in any case involving the construction or application of the Constitution of the United States; in any case in which is drawn in question the constitutionality of any law of the United States, or the validity or construction of any treaty made under its authority; in any case in which the constitution or law of a state is claimed to be in contravention of the Constitution of the United States; and on any case in which the jurisdiction of the court is in issue, but in such cases the question of jurisdiction alone shall be certified by the court below for decision.[16]

The appellate jurisdiction of the Supreme Court also extends to final judgments of the court of claims.[17]

The supervisory jurisdiction of the federal courts is exercised by removal, upon petition of, and bond filed by, the defendant before filing plea or answer, of a pending civil cause from a state court to the circuit court of the United States of the proper district where the case is one of a class of which the circuit court has jurisdiction under the statutes, and where the suit arises under the Constitution, laws, or treaties of the United States, or where the defendant is a non-resident of the state, or where the controversy is wholly between citizens of different states, and it can be fully determined as between them, or where it shall be made to appear before the circuit court that the defendant, being a citizen of a state other than that in which the action is pending, cannot, by reason of apprehended prejudice or local influence, obtain justice in the state court.[18] The circuit court may remand to the state court any cause not properly removed.[19]

[16] Act 3d Mar., 1891, c. 517, sec. 5, *ut supra.*

[17] Rev. Stat., sec. 709.

[18] Act 13th Aug., 1888, c. 866, 25 Stat. 433.

[19] *Ibid.*

It is foreign to the purpose of this book to discuss in detail the practice in the different courts.

The necessity of a judicial "case."

103. Whatever be the form in which the jurisdiction of the courts of the United States is invoked, it is essential to the exercise of the jurisdiction that there should be a "case" before the court, that is, a subject-matter for judicial determination contested by competent parties.[20] The courts, therefore, will not give judgment upon "moot" questions, or abstract propositions.[21] If it appear from the record, or be proven *aliunde,* that a judgment brought up for review has been satisfied, the appeal must be dismissed.[22] It is also essential that the question for decision be judicial in character, for the courts cannot decide political questions, such as whether or not the people of a state have altered their form of government by abolishing an old government and establishing a new one in its place,[23] nor whether or not, in a foreign country, a new government has been established,[24] nor whether or not the United States has sovereignty over a territory,[25] nor can the courts by injunction restrain a state from the forcible exercise of legislative power over an Indian tribe "asserting their independence, the right to which the state

[20] Osborn *v.* Bank of the U. S., 9 Wheat. 738; Cohens *v.* Virginia, 6 *id.* 379; Upshur County *v.* Rich, 135 U. S. 467; L. A. S. M. Co. *v.* U. S., 175 *id.* 423; Lampasas *v.* Bell, 180 *id.* 276.

[21] Mills *v.* Green, 159 U. S. 651; N. O. F. Inspectors *v.* Glover, 160 *id.* 170; Tyler *v.* Judges of Court of Registration, 179 *id.* 404; Codlin *v.* Kohlhausen, 181 *id.* 151; Turpin *v.* Lemon, 187 *id.* 51; Chadwick *v.* Kelley, *ibid.* 540; Smith *v.* Indiana, 191 *id.* 138.

[22] A. B. Co. *v.* Kansas, 193 U. S. 49.

[23] Luther *v.* Borden, 7 How. 1, 147.

[24] Rose *v.* Himely, 4 Cr. 241, 272; Gelston *v.* Hoyt, 3 Wheat. 246, 324; Kennett *v.* Chambers, 14 How. 38; Terlinden *v.* Ames, 184 *id.* 270.

[25] Jones *v.* U. S., 137 U. S. 202; *In re* Cooper, 143 U. S. 472, 503; *cf.* U. S. *v.* Texas, *ibid.* 621.

denies,"[26] nor enjoin the executive department of the government of the United States from carrying into effect acts of Congress alleged to be unconstitutional.[27] Such questions can only be decided by the political power, "and when that power has decided, the courts are bound to take notice of its decision and to follow it."[28] Upon this principle, the recognition by Congress and the executive of the state governments of the then lately rebellious states as reconstructed after the suppression of the rebellion was held to be binding upon the judicial department of the government.[29] But the courts may compel the performance of a ministerial and non-discretionary duty by an executive officer, as, for instance, the delivery of a signed and sealed commission to an officer who has been appointed, nominated, and confirmed,[30] or the crediting to a government creditor of a sum of money found by the Treasury to be due under the express terms of an act of Congress.[31]

[26] The Cherokee Nation *v.* Georgia, 5 Pet. 1, 20.

[27] Mississippi *v.* Johnson, 4 Wall. 475; Georgia *v.* Stanton, 6 *id.* 50. See, however, dicta in Cruickshank *v.* Bidwell, 176 U. S. 73, and cases there cited.

[28] Luther *v.* Borden, 7 How. 1.

[29] Texas *v.* White, 7 Wall. 700.

[30] Marbury *v.* Madison, 1 Cr. 137.

[31] Kendall *v.* U. S., 12 Pet. 521. See also Noble *v.* U. R. L. R., 147 U. S. 165; Decatur *v.* Paulding, 14 Pet. 497; U. S. *v.* Schurz, 102 U. S. 378; Butterworth *v.* Hoe, 112 *id.* 50; U. S. *v.* Black, 128 *id.* 40, 50; U. S. *v.* Windom, 137 *id.* 636; U. S. *v.* Blaine, 139 *id.* 306; New Orleans *v.* Paine, 147 *id.* 261; Roberts *v.* U. S., 176 *id.* 221; De Lima *v.* Bidwell, 182 *id.* 1; Fok Yung Yo *v.* U. S., 185 *id.* 296; A. S. of M. H. *v.* McAnnulty, 187 *id.* 94.

In the courts of the United States, laws of foreign countries may be proved as facts, C. & A. R. *v.* W. F. Co., 119 U. S. 615, 622; L. & G. W. S. Co. *v.* P. I. Co., 129 *id.* 397, 445; Talbot *v.* Seeman, 1 Cr. 1; Church *v.* Hubbart, 2 *id.* 187; Strother *v.* Lucas, 6 Pet. 763; Armstrong *v.* Lear, 8 *id.* 52, by official publications thereof, satisfactorily certified, Ennis *v.* Smith, 14 How. 400, or by written copies thereof attested by the oath of a United States consul, Church *v.* Hubbart, 2 Cr. 187. Unwritten foreign laws may be proved by the testimony of experts, Livingston *v.* M. I. Co., 6 Cr. 274; Ennis *v.* Smith, 14 How. 400; Pierce *v.* Indseth, 106 U. S. 546. The courts of the United States take notice, without proof, of the laws of the several states, C. & A. R. *v.* W. F. Co., 119 U. S. 615, 622; Owings *v.* Hull, 9 Pet. 607, and

The federal judiciary.

104. The courts of the United States have contributed to the history of the country a chapter which every American citizen can read with pride. The dignity of the judicial office, its security of tenure, and its consequent independence of political dictation and control, have so far compensated for the inadequacy of the salaries that lawyers who might reasonably look forward to lucrative practice have, in many instances, been induced to accept seats upon the federal bench. The judges have been, with scarcely an exception, learned and able lawyers, and their personal characters have given weight to their judgments. They have performed their judicial duties with courage, faithfulness, and intelligence. They have, in general, administered with firmness, and with tact, the extensive jurisdiction of their courts. All that is to be said of the federal judges, in general, can be said, with even greater force, of the successive Chief Justices and Justices of the Supreme Court of the United States. Sovereign states, vast aggregations of capital, and the mass of the people have respectfully bowed to the judgments of that tribunal. No fair-minded man has ever doubted, however much he might be disposed to criticise the result in any particular cause, that the court in arriving at its conclusions had given full consideration to every fact and every argument and had earnestly endeavoured to do justice. The work of the court which has attracted most attention has been in its interpretation of the Constitution. In the performance of that duty the court has had

of the laws governing territory subsequently acquired by the United States, U. S. *v.* Perot, 98 U. S. 428; Fremont *v.* U. S., 17 How. 542, 557. But the Supreme Court of the United States, in the exercise of its appellate jurisdiction, does not take judicial notice of the laws of foreign countries, nor of the laws of the several states of the United States, if such laws have not been found as facts in the courts of the first instance, Hanley *v.* Donoghue, 116 U. S. 1; C. & A. R. *v.* W. F. Co., 119 U. S. 615, 623.

to apply an instrument made at the birth of the government to the changing conditions of the nation's development. This has been done in all cases with judicial deliberation, and, in almost all cases, with the wisdom of statesmen.

The court, in all but two instances, has wisely held itself aloof from political controversies whose consideration it was possible to avoid. In 1803,[32] judges who were Federalists united in an opinion which, if it could have been enforced by a judgment, would have deprived the Democratic party of those spoils of office which that party regarded as the fruits of its triumph over the Federalist party. In 1857,[33] judges who were Democrats thought they had established the indefeasible right of slavery to occupy the territories of the United States. The cases were alike in that in each instance the court, having proved to its satisfaction that it had no jurisdiction over the subject-matter of decision, proceeded to a judicial determination upon the merits of the controversy; and in each instance the country revolted against the attempted judicial usurpation of political functions.

The greatest service which the Supreme Court of the United States has rendered to the country is that throughout our history it has been an object lesson of the supremacy of law. It is impossible to overstate the vital importance to the republic of the teaching of this lesson, a lesson so hard for a democracy to learn, and so essential to the maintenance of free institutions.

The federal supremacy.

105. The law administered in the courts of the United States is found in the Constitution, in acts of Congress,

[32] Marbury *v.* Madison, 1 Cr. 137.
[33] Dred Scott *v.* Sandford, 19 How. 393.

in treaties made by the United States, and in the judgments of the Supreme Court.

Section 2 of Article VI of the Constitution declares, that "this Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding."

The Constitution is the Constitution as orginally ratified, and as subsequently amended in the manner and under the restrictions contained in the Constitution, and as construed by the judicial department of the government so far as regards all that may properly become a subject-matter of judicial determination. The validity of an act of Congress is dependent upon its conformity to the Constitution.[34] The validity of an act of a state legislature is dependent upon its conformity to the Constitution of the United States and also upon its conformity to the constitution of its state.

But an act of legislation will not, on slight implication, or vague conjecture, be judicially determined to be in conflict with the Constitution, for the presumption is always in favour of the constitutionality of a law.[35] Statutes, which are constitutional in part only, will be upheld by the court so far as they are not in conflict with the Constitution, provided that their constitutional, and their uncon-

[34] Marbury *v.* Madison, 1 Cr. 137; Norton *v.* Shelby County, 118 U. S. 425.

[35] Fletcher *v.* Peck, 6 Cr. 87; Legal Tender Cases, 12 Wall. 531; U. S. *v.* Harris, 106 U. S. 629; U. S. *v.* G. E. Ry., 160 *id.* 668; Brown *v.* Walker, 161 *id.* 591; Nicol *v.* Ames, 173 *id.* 509; H. & T. C. R. *v.* Texas, 177 *id.* 66; Fairbank *v.* U. S., 181 *id.* 283; Booth *v.* Illinois, 184 *id.* 425; Reid *v.* Colorado, 187 *id.* 137; The Japanese Immigrant Case, 189 *id.* 86, 101; Buttfield *v.* Stranahan, 192 *id.* 470.

stitutional, parts be severable;[36] but when the unconstitutional parts of such a statute are so connected with its general scope, that, should they be stricken out, effect cannot be given to the legislative intent, the other provisions of the statute must fall with them.[37]

Constitutional and statutory construction.

106. The colonial lawyers were familiar with the idea of a judicial determination of the invalidity of an act of legislation by reason of its contravention of an organic law, for they not infrequently had their attention called to deliverances by the Privy Council in England holding invalid acts of colonial legislatures for the want of conformity to colonial charters, or to English statutes. It is therefore not surprising that there are dicta and judgments of colonial courts recognizing this principle.[38]

Alexander Hamilton,[39] after saying that the independence of the courts is essential in a country where the Constitution limits the power of the legislatures by specific exceptions therefrom, adds that such "limitations . . . can be preserved in practice in no other way than through the medium of courts of justice whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. . . . The Constitution ought to be preferred to the statute, the intention of the people to the intention

[36] Packet Co. *v.* Keokuk, 95 U. S. 80; Pollock *v.* F. L. & T. Co., 158 *id.* 601; *cf.* Presser *v.* Illinois, 116 *id.* 252.

[37] Trade-Mark Cases, 100 U. S. 82; Allen *v.* Louisiana, 103 *id.* 80; U. S. *v.* Harris, 106 *id.* 629; Virginia Coupon Cases, 114 *id.* 269; Spraigue *v.* Thompson, 118 *id.* 90; Baldwin *v.* Franks, 120 *id.* 678; Pollock *v.* F. L. & T. Co., 158 *id.* 601; *cf.* Connolly *v.* U. S. P. Co., 184 *id.* 540.

[38] Commonwealth *v.* Caton, 4 Call, Virginia Reports, 5, per Wythe, J.; Holmes *v.* Walton, cited in State *v.* Parkhurst, 9 N. J. L. 427, 444; Trevett *v.* Weeden, 2 Arnold's History of Rhode Island, 525; Bayard *v.* Singleton, 1 Martin, North Carolina Reports, 42; Bowman *v.* Middleton, 1 Bay, South Carolina Reports, 252; Cooley's Constitutional Limitations, 55.

[39] Federalist, No. 78, 9 Hamilton's Works, Lodge's Edition, pp. 482, 484.

of their agents. . . . The prior charter of the superior ought to be preferred to the subsequent acts of an inferior and subordinate authority, and . . . accordingly whenever a particular statute contravenes the Constitution it will be the duty of the judicial tribunals to adhere to the latter and disregard the former." This reasoning has been adopted and uniformly followed by the court.[40]

The most important function of the courts is that of construing the Constitution, and that construction is authoritatively and finally, so far as regards subject-matters of judicial determination, made by the Supreme Court of the United States. The rules, which are applied by the court in the construction of the Constitution, are few and simple. (1). The construction is neither lax nor rigorous, but such as to effectuate the purpose of the instrument as "an establishment of a frame of government and a declaration of that government's fundamental principles intended to endure for ages and to be adapted to the various crises of human affairs."[41] (2). The antecedent history of the country and the state of the public affairs at the time of the adoption of the Constitution are considered, in order that the old law, the mischief, and the remedy may have their relative weight.[42] (3). A contemporaneous legislative exposition acquiesced in for a long term of years fixes the construction.[43] (4). The words are read in their natural sense,[44] departing from and varying by construction the natural meaning of the words only where

[40] Marbury *v.* Madison, 1 Cr. 137. See also the language of Taney, C. J., quoted in the appendix to 117 U. S.

[41] Juilliard *v.* Greenman, 110 U. S. 421; Gibbons *v.* Ogden, 9 Wheat. 1; Martin *v.* Hunter's Lessee, 1 Wheat. 304.

[42] Rhode Island *v.* Massachusetts, 12 Pet. 657; Maxwell *v.* Dow, 176 U. S. 581, 602.

[43] Stuart *v.* Laird, 1 Cr. 299; Briscoe *v.* The Bank of the Commonwealth of Kentucky, 11 Pet. 257, 317; C. M. Co. *v.* Ferguson, 113 U. S. 727. See also Downes *v.* Bidwell, 182 *id.* 244.

[44] Gibbons *v.* Ogden, 9 Wheat. 1.

different clauses of the instrument bear upon each other and would conflict, unless the words were construed otherwise than by their natural and common import.[45] (5). An exception from a power which is granted in express terms marks the extent of the power and shows that the power necessarily includes other cases which come within the terms of the grant and which might have been, but were not, specifically excepted.[46] (6). When a term of the common law is used, its common-law meaning is adopted with it.[47] (7). The Federalist is not, of course,

[45] Sturges *v.* Crowninshield, 4 Wheat. 122. Story, J., said, in Prigg *v.* Penna., 16 Pet. 610, "Perhaps, the safest rule of interpretation after all will be found to be to look to the nature and objects of the particular powers, duties, and rights, with all the lights and aids of contemporary history; and to give to the words of each just such operation and force, consistent with their legitimate meaning, as may fairly secure and attain the ends proposed."

[46] Gibbons *v.* Ogden, 9 Wheat. 1; Rhode Island *v.* Massachusetts, 12 Pet. 657; Brown *v.* Maryland, 12 Wheat. 438.

[47] In Schick *v.* U. S., 195 U. S. 65, Brewer, J., said, in reference to a clause of Article III, "It must be read in the light of the common law. 'That,' said Mr. Justice Bradley, in Moore *v.* U. S., 91 U. S. 270, 274, referring to the common law, 'is the system from which our judicial ideas and legal definitions are derived. The language of the Constitution and of many acts of Congress could not be understood without reference to the common law.' Again, in Smith *v.* Alabama, 124 U. S. 465, 478, is this declaration by Mr. Justice Matthews: 'The interpretation of the Constitution of the United States is necessarily influenced by the fact that its provisions are framed in the language of the English common law, and are to be read in the light of its history.' In U. S. *v.* Wong Kim Ark, 169 U. S. 649, 654, Mr. Justice Gray used this language: 'In this, as in other respects, it must be interpreted in the light of the common law, the principles and history of which were familiarly known to the framers of the Constitution.'" Duncan, J., said in Lyle *v.* Richards, 9 S. & R. 356, "In American legislation, when a term of the common law is adopted, the common-law meaning is adopted with it." Marshall, C. J., said in U. S. *v.* Burr, 4 Cr. 470, in commenting on the phrase "levying war" in the constitutional definition of treason, "It is a technical term; it is used in a very old statute in that country, whose language is our language, and whose laws form the *substratum* of our laws. It is hardly conceivable that the term was not employed by the framers of our Constitution in the sense which has been affixed to it by those from whom we borrowed it. So far as the meaning of any terms, particularly terms of art, is completely ascertained, those by whom they are employed must be considered as employing them in that ascertained meaning, unless the contrary be proved by the context."

of binding authority upon the Supreme Court with regard to the judicial construction of the Constitution, but as Marshall, C. J., said in Cohens *v.* Virginia,[48] the "opinion of the Federalist has always been considered as of great authority. It is a complete commentary on our Constitution, and is appealed to by all parties in the questions to which that instrument has given birth. Its intrinsic merit entitles it to this high rank, and the part two of its authors performed in framing the Constitution put it very much in their power to explain the views with which it was framed." (8). The reported proceedings of the convention which framed the Constitution, and of the several state conventions which ratified it, though frequently referred to in the discussions of questions of constitutional construction, are not of binding authority. The views expressed in the debates are merely the views of the individual speakers, and do not necessarily express the view of the subject which induced the federal convention to insert the particular provision in the Constitution as framed by them, or which led the convention of any one state to ratify the Constitution.[49] The votes of the convention on the details of the Constitution are of no greater importance, for an affirmative vote approving a particular section of the Constitution, throws no light on the meaning of the words of the section; and a negative vote rejecting a proposed constitutional provision may with equal propriety be regarded as an expression of opinion to the effect that the proposed provision is unnecessary because adequately supplied by other provisions of the Constitution, or as a refusal to adopt the particular provision because in the opinion of the convention such a provision ought not to be inserted in the Constitution. It must be

[48] 6 Wheat. 418. See Sir Henry Maine's "Popular Government," p. 202, for references to foreign eulogies of the Federalist.

[49] U. S. *v.* U. P. R., 91 U. S. 72, 79.

remembered that the Constitution derives its whole force and authority from its ratification by the people,[50] and whenever it becomes necessary to determine the meaning of any clause in the Constitution, the real question for decision is, not what did the federal convention, or any member thereof, understand that clause to mean when that convention framed the Constitution, nor what did the members of any particular state convention understand that clause to mean when their convention ratified the Constitution, but what did that clause really mean as ratified by all the conventions, and that meaning can only be determined by the application of the established rules of judicial construction.[51]

The meaning of a statute is determined by the application of rules of construction, which are substantially the same as the rules of constitutional construction, and whose object is simply to determine the legislative intent, which is the natural and reasonable effect of the words used.[52]

Judgments of courts.

107. A judgment of a court is an application of a rule of law to the facts of a particular case, and its value as an authority is dependent upon the extent and finality of the jurisdiction of the court and upon an ascertainment of the facts as presented to the mind of the court and a deduction of the rule of law determining the decision on those facts.[53] The opinion of any court or judge upon a

[50] McCulloch *v.* Maryland, 4 Wheat. 316, 404.

[51] The view as stated in the text was forcibly put by R. C. McMurtrie, Esq., in his "Observations on Mr. George Bancroft's Plea for the Constitution," p. 8 *et seq.* See also Maxwell *v.* Dow, 176 U. S. 581, 601.

[52] Henderson *v.* N. Y., 92 U. S. 259, 260; Soon Hing *v.* Crowley, 113 *id.* 703, 710; Mugler *v.* Kansas, 123 *id.* 623, 661; Minnesota *v.* Barber, 136 *id.* 313, 320.

[53] Knatchbull *v.* Hallett, 13 Ch. Div. 712; Ginesi *v.* Cooper, 14 *id.* 601; Ogden *v.* Saunders, 12 Wheat. 333.

question whose determination is not essential to the decision upon the facts of the cause is only *obiter dictum* and, although entitled to be received with great respect, it is not to be regarded as an authoritative precedent. The opinions of the judges are, therefore, of value only in so far as they ascertain the facts and deduce the rule whose application decides the cause. It would be well if dissenting opinions were not published, and if the fact of any dissent were not recorded, for any dissent necessarily weakens the force of the judgment as a precedent.

Treaties.

108. Treaties, when duly ratified, are of inferior authority to the Constitution,[54] but they are superior in authority to state legislation.[55] Where there is a repugnancy between a treaty and an act of Congress that which is of later date will prevail.[56] Where a treaty declares the rights and privileges which the citizens or subjects of a foreign nation may enjoy in the United States it, in general, operates by its own force, and does not require the aid of any congressional enactment.[57] While, as respects the rights and obligations of the contracting governments, a treaty is to be regarded as concluded and binding from the date of its signature,[58] yet as respects the effects of the

[54] Geofroy *v.* Riggs, 133 U. S. 258, 267; Thomas *v.* Gay, 169 *id.* 264, 271.

[55] U. S. *v.* Forty-three Gallons of Whiskey, 93 U. S. 188; Hauenstein *v.* Lynham, 100 *id.* 483; Butler *v.* B. & S. S. Co., 130 *id.* 527; G., C. & S. F. Ry. *v.* Hefley, 158 *id.* 98; Ohio *v.* Thomas, 173 *id.* 276; Boske *v.* Comingore, 177 *id.* 459; Easton *v.* Iowa, 188 *id.* 220.

[56] U. S. *v.* Schooner Peggy, 1 Cr. 103; Foster *v.* Neilson, 2 Pet. 253, 314; The Cherokee Tobacco, 11 Wall. 616; Head Money Cases, 112 U. S. 580; Whitney *v.* Robertson, 124 *id.* 190; Botiller *v.* Dominguez, 130 *id.* 238; The Chinese Exclusion Case, *ibid.* 581; Horner *v.* U. S., 143 *id.* 570; Fong Yue Ting *v.* U. S., 149 *id.* 698; Wong Wing *v.* U. S., 163 *id.* 228; De Lima *v.* Bidwell, 182 *id.* 1. See also U. S. *v.* Lee Yen Tai, 185 *id.* 213.

[57] Chirac *v.* Chirac, 2 Wheat. 259; Hughes *v.* Edwards, 9 *id.* 489, 496; Carneal *v.* Banks, 10 *id.* 181; Hauenstein *v.* Lynham, 100 U. S. 483. But see Baldwin *v.* Franks; 120 U. S. 678.

[58] Dana's Wheaton's International Law, 36.

treaty on the rights of citizens of the United States vested before the ratification of the treaty but subsequently to its signature, the treaty is not to be considered as a part of the supreme law of the land until after its ratifications have been exchanged, for the Senate may in process of ratification amend the treaty,[59] and it cannot be known, until it be ratified, what it may command or prohibit.[60] Treaties do not, unless they be in express terms retroactive, affect rights vested, or liabilities incurred, before their ratification.[61] The abrogation of a treaty operates only on future transactions, leaving unaffected previously executed transactions and vested property interests, but not personal and non-transferable rights.[62]

The law administered in the federal courts.

109. In criminal cases the jurisdiction of the courts of the United States is statutory and an indictment cannot be tried for a common-law offense. They, therefore, administer on the criminal side only that jurisdiction which is granted by the Constitution, treaties, and statutes of the United States.[63]

In civil causes, where the jurisdiction of the court depends on the character of the cause, as raising for decision a question of federal law, the only law that can be administered therein is that of the Constitution, statutes, and treaties of the United States. But in causes where the jurisdiction attaches only by reason of the diverse citizen-

[59] Art. II, Section 2, of the Constitution requires the advice and consent of the Senate, and the concurrence of two-thirds of the Senators present, to the making of any treaty by the President.

[60] U. S. *v.* Arredondo, 6 Pet. 691, 749; Haver *v.* Yaker, 9 Wall. 32.

[61] Prevost *v.* Greneaux, 19 How. 1; Frederickson *v.* Louisiana, 23 *id.* 445.

[62] Chinese Exclusion Case, 130 U. S. 581.

[63] U. S. *v.* Hudson, 7 Cr. 32; U. S. *v.* Coolidge, 1 Wheat. 415; Penna. *v.* W. & B. Bridge, 13 How. 519. The United States have no common law Wheaton *v.* Peters, 8 Pet. 591; Smith *v.* Alabama, 124 U. S. 465, 478; W. U. T. Co. *v.* C. P. Co., 181 U. S. 92, 101.

ship of the parties, the law administered ought to be that of the state within whose territory the court of the first instance sits, excepting, of course, in those causes in which the *lex loci contractus* differs from the *lex fori,* and the former law is applicable. The only reason that the framers of the Constitution could have had for opening the courts of the United States to one who litigates only in right of diverse citizenship is the possibility of bias or prejudice against him in the state court. This reason for the jurisdiction was recognized by the Supreme Court in an early case,[64] but later cases adopt a broader view, which must now be regarded as the established judicial theory of the constitutional intent. If a citizen of one state has a cause of action against a citizen of another state, and he brings his action in the courts of that other state his right is to have an impartial trial and to have his cause decided by the application of the law of that state. That law can only be found in the constitution and statutes of the state, as construed by the state court of last resort, and in the principles of the common, or civil, law, as the case may be, as recognized by the judicial decisions of the state court of last resort. When that litigant goes into a court of the United States to enforce that cause of action, the change of forum should not change the law which must be applied to and must decide the cause. Each state is entitled as of right *jus dare et jus dicere,* to make the law and

[64] Polk's Lessee *v.* Wendell, 9 Cr. 87. Johnson, J., said: "The sole object for which jurisdiction of cases between citizens of different states is vested in the courts of the United States is to secure to all the administration of justice upon the same principles upon which it is administered between citizens of the same state. The Court, in a later and unanimous judgment, speaking by Bradley, J., said (Burgess *v.* Seligman, 107 U. S. 20, 34): "The very object of giving to the national courts jurisdiction to administer the laws of the states in controversies between citizens of different states was to institute independent tribunals which it might be supposed would be unaffected by local prejudices and sectional views." This broad statement is quoted with approval in the most recent case, G. S. F. H. Co. *v.* Jones, 193 U. S. 532, 544.

to declare the law, as to all subject-matters of legislative and judicial determination, which have not been delegated by the Constitution to the United States; and any subject-matter of which a court of the United States can only take jurisdiction by reason of the diverse citizenship of the parties is necessarily a subject-matter as to which the United States cannot legislate, and over which it ought not to exercise judicial jurisdiction otherwise than by applying the law of the state. It is is true that the federal tribunals exercise as to such subject-matters an independent though concurrent jurisdiction, but it does not follow that the federal judges should be at liberty to ascertain and declare the law of the state according to their own judgment, not of what that law is, but of what that law ought to be. On the contrary, the law of the state like the law of a foreign country should be proven and found as a fact by the federal judges. The Judiciary Act of 1789 [65] declares that "the laws of the several states, except where the Constitution, treaties, or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply." This statutory requirement ought to have been construed to require the application of state rules of law as evidenced by state constitutions, statutes, and judgments of state courts of last resort, in all cases where the jurisdiction attaches solely by reason of diverse citizenship, but the court has held otherwise, and it is settled law, that while the courts of the United States will accept and follow a fixed construction by the judicial department of a state of its constitution and statutes,[66] yet, when the decisions

[65] Rev. Stat., sec. 721.

[66] Webster *v.* Cooper, 14 How. 488; Jackson *v.* Chew, 12 Wheat. 153, 167; Townsend *v.* Todd, 91 U. S. 452; H. F. I. Co. *v.* C., M. & St. P. Ry., 175 *id.* 91, 100; Dooley *v.* Pease, 180 *id.* 126.

of the state's court of last resort are not consistent the United States courts do not feel bound to follow the last decision;[67] nor will the federal courts follow a state decision rendered after the cause of action has accrued.

Upon questions of general commercial law,[68] and questions of real property law depending upon general principles of law,[69] and in actions upon contracts or upon questions of "general jurisprudence of national or universal application"[70] the court will determine the law for itself and it will not follow state decisions which, in the judgment of the court, do not lay down the law as the federal courts hold that it ought to be laid down.

The fundamental objection to this rule of the court is that, as Congress cannot under the Constitution legislate on any other than a federal subject-matter, the enforcement by the federal court, in controversies as to contracts, or commercial obligations, or title to real property, of a law different from the state law, as formulated in its acts of legislation and in the judgments of its courts, is nothing else than the establishment and enforcement of a body of judge-made law with no statutory basis, and without possibility of legislative amendment.[71]

In causes of civil cognizance, where the federal court has acquired original jurisdiction under the Constitution and laws of the United States, it may protect rights and admin-

[67] Pease *v.* Peck, 18 How. 595; Cross *v.* Allen, 141 U. S. 528; Burgess *v.* Seligman, 107 *id.* 20, 33; Carroll County *v.* Smith, 111 *id.* 556; S. T. Co. *v.* B. R. N. Bank, 187 *id.* 211.

[68] Swift *v.* Tyson, 16 Pet. 1.

[69] Town of Venice *v.* Murdock, 92 U. S. 494.

[70] Gelpcke *v.* Dubuque, 1 Wall. 175; O. L. & T. Co. *v.* Debolt, 16 How. 416, 432; R. Co. *v.* Lockwood, 17 Wall. 357; Oates *v.* Nat. Bank, 100 U. S. 239; R. Co. *v.* Nat. Bank, 102 *id.* 14, 30, 31; Myrick *v.* M. C. R., 107 *id.* 102, 109; Pana *v.* Bowler, *ibid.* 529; Bolles *v.* Brimfield, 120 *id.* 759; Clark *v.* Bever, 139 *id.* 96.

[71] This subject is ably discussed in Mr. George Wharton Pepper's brilliant essay upon "The Borderland of Federal and State Decisions," 1887.

ister remedies not only under the Constitution, laws, and treaties of the United States, but also under the common law, as adopted by the state within which the court sits,[72] the principles of equitable jurisprudence, "as distinguished and defined in that country from whence we derive our knowledge of those principles,"[73] and the statutes of the state.[74]

In admiralty the maritime law is administered, "with such amendments and modifications as Congress may from time to time have adopted."[75]

Courts martial and impeachments.

110. The judicial jurisdiction of the United States, except as regards offenses of soldiers and sailors against the Articles of War, and crimes punishable by impeachment, can only be exercised by courts duly constituted under the Constitution and the laws. Congress, therefore, cannot invest courts martial or military commissions with jurisdiction to try, convict, or sentence for any offense, a citizen not being a resident of a state in rebellion, nor a prisoner of war, nor in the military or naval service of the

[72] Parsons *v.* Bedford, 3 Pet. 433; Wheaton *v.* Peters, 8 *id.* 591; Parish *v.* Ellis, 16 *id.* 451; *Ex parte* Bollman and Swartwout, 4 Cr. 75; Cross *v.* Allen, 141 U. S. 528; Dooley *v.* Pease, 180 *id.* 126; W. U. T. Co. *v.* C. P. Co., 181 *id.* 92; *cf.* Swift *v.* Tyson, 16 Pet. 1; Bucher *v.* C. R., 125 U. S. 555; L. & G. W. S. Co. *v.* P. I. Co., 129 *id.* 397, 443; Clark *v.* Bever, 139 *id.* 96; T. & P. Ry. *v.* Cox, 145 *id.* 593; Ellenwood *v.* M. C. Co., 158 *id.* 105. See also Pepper: "Borderland of Federal and State Decisions."

[73] Robinson *v.* Campbell, 3 Wheat. 222; Livingston *v.* Story, 9 Pet. 632; Pennsylvania *v.* W. & B. Bridge Co., 13 How. 563; Holland *v.* Challen, 110 U. S. 15; Ridings *v.* Johnson, 128 *id.* 212; Mississippi Mills *v.* Cohn, 150 *id.* 202; Hollins *v.* B. C. & I. Co., *ibid.* 371; *cf.* Scott *v.* Neely, 140 *id.* 106.

[74] Edwards *v.* Elliott, 21 Wall. 532; The Lottawanna, *ibid.* 558; Ry. Co. *v.* Whitton, 13 *id.* 270; *Ex parte* Gordon, 104 U. S. 515; *Ex parte* Ferry Co., *ibid.* 519; Case *v.* Kelly, 133 *id.* 21; Turner *v.* Wilkes County Commissioners, 173 *id.* 461; H. F. I. Co. *v.* C., M. & St. P. Ry., 175 *id.* 91; *cf.* Friedlander *v.* T. & P. Ry., 130 *id.* 416; C., M. & St. P. Ry. *v.* Solan, 169 *id.* 133.

[75] *In re* Garnett, 141 U. S. 1, 14; *supra*, sec. 93.

United States.[76] That which may be termed the extraordinary judicial power of the United States is exercised only by courts martial and in the trial of impeachments. Courts martial may exercise judicial jurisdiction with regard to offenses against the Articles of War by soldiers, sailors, and militiamen when called out for service.[77]

The relevant provisions of the Constitution, as to impeachments, are that, "the House of Representatives shall . . . have the sole power of impeachment;"[78] "the Senate shall have the sole power to try all impeachments. When sitting for that purpose, they shall be on oath or affirmation. When the President of the United States is tried, the Chief Justice shall preside; and no person shall be convicted without the concurrence of two-thirds of the members present. Judgment in cases of impeachment shall not extend further than to removal from office, and disqualification to hold and enjoy any office of honour, trust, or profit under the United States; but the party convicted shall nevertheless be liable and subject to indictment, trial, judgment and punishment, according to law."[79] "The President, Vice-President and all civil officers of the United States, shall be removed from office on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors."[80] "The President shall . . . have power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment."[81] "The trial of all crimes, except

[76] *Ex parte* Milligan, 4 Wall. 2.

[77] Wise *v.* Withers, 3 Cr. 331; Houston *v.* Moore, 5 Wheat. 1; Martin *v.* Mott, 12 *id.* 19; Dynes *v.* Hoover, 20 How. 65; *Ex parte* Mason, 105 U. S. 696; Keyes *v.* U. S., 109 *id.* 336; Wales *v.* Whitney, 114 *id.* 564; Johnson *v.* Sayre, 158 *id.* 109.

[78] Art. I, Sec. 2.

[79] Art. I, Sec. 3.

[80] Art. II, Sec. 4.

[81] Art. II, Sec. 2.

in cases of impeachment, shall be by jury."[82] "No bill of attainder or *ex post facto* law shall be passed."[83] The Supreme Court of the United States has never decided any question as to impeachment, but a consideration of the constitutional provisions shows clearly that, under them, the House of Representatives is the prosecutor; any civil officer of the United States may be the defendant; the Senate of the United States is the court, its members being first sworn or affirmed, the Chief Justice of the Supreme Court of the United States presiding in the case of a trial of the President, and a concurrence of two-thirds of the members present being necessary to a conviction; the offenses for which an impeached officer may be tried being "treason, bribery, or other high crimes and misdemeanors," as defined by laws of the United States enacted before the commission of the offense; the punishment extending only "to removal from office and disqualification to hold and enjoy any office of honour, trust, or profit under the United States," but without prejudice to indictment, trial, and conviction at law for the same offense; and a presidential pardon not being pleadable in bar of the impeachment nor efficacious in satisfaction of a conviction after impeachment, or in mitigation of the punishment.

The IV Amendment.

111. The exercise of judicial power by the United States is, in some respects, limited by certain other of the provisions of the Constitution and its Amendments. In the most important case that ever came before the Supreme Court,[84] it was held that neither the President, nor

[82] Art. III, Sec. 2.
[83] Art. I, Sec. 9.
[84] *Ex parte* Milligan, 4 Wall. 2.

the Congress, nor the Judicial Department can deny to a citizen any one of the safeguards of civil liberty incorporated into the Constitution, and in that cause a citizen who was held in custody under a sentence of death pronounced by a military commission was released upon *habeas corpus*. The last clause of Section 2 of Article III of the Constitution declares that "the trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the state where the said crimes shall have been committed; but when not committed within any state, the trial shall be at such place or places as the Congress may by law have directed." This clause controls criminal proceedings in the District of Columbia.[85] It does not prohibit the establishment of consular tribunals in foreign lands;[86] or the waiver of jury trial for minor offenses.[87] The IV Amendment declares that "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." This Amendment forbids Congress to authorize a court in revenue cases to require, on motion of the government's attorney, the defendant, or claimant, to produce in court his books, papers, etc., under penalty of admitting the allegations of the government's attorney as to that which those books, papers, etc., would prove if produced.[88]

[85] Callan *v.* Wilson, 127 U. S. 540.

[86] *In re* Ross, 140 U. S. 453.

[87] Schick *v.* U. S., 195 U. S. 65; Harlan, J., dissented. On the same clause, see also N., C. & St. L. Ry. *v.* Alabama, 128 *id.* 96; *In re* Debs, 158 *id.* 564, 581.

[88] Boyd *v.* U. S., 116 U. S. 616. See also Adams *v.* New York, 192 *id.* 585, for a discussion of the Amendment.

The V Amendment—*(a)* Due process of law.

112. The V Amendment[89] declares, that "no person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger." This constitutional provision forbids a prosecution upon information in the courts of the United States in the cases of crimes punishable by imprisonment for a term of years at hard labour.[90] But a court may, for professional misconduct, strike an attorney from its rolls;[91] and a court martial may try a naval officer in time of peace, the qualification "when in actual service in time of war or public danger" applying only to the militia.[92] This Amendment also forbids the trial or conviction of a prisoner in a case where after presentment made by the grand jury, the indictment is without resubmission to the grand jury, amended by striking out words, even though those words be regarded by the court as surplusage, and a prisoner, after trial, conviction, and sentence on an indictment so amended, is entitled to his discharge on *habeas corpus*.[93] The same Amendment also declares that no person shall "be deprived of life, liberty, or property, without due process of law." In Murray's Lessee *v.* H. L. & I. Co.,[94] Curtis, J., said, "The words

[89] The V Amendment is a restraint upon the exercise of powers by the United States, but not by the states: Barron *v.* Baltimore, 7 Pet. 243; Withers *v.* Buckley, 20 How. 84; Davidson *v.* New Orleans, 96 U. S. 97; Kelly *v.* Pittsburgh, 104 *id.* 78; Thorington *v.* Montgomery, 147 *id.* 490; C. C. D. Co. *v.* Ohio, 183 *id.* 238; Ohio *v.* Dollison, 194 *id.* 445; nor by an Indian tribe: Talton *v.* Mayes, 163 *id.* 376.

[90] *Ex parte* Wilson, 114 U. S. 417; Mackin *v.* U. S., 117 *ia.* 348; Parkinson *v.* U. S., 121 *id.* 281; U. S. *v.* De Walt, 128 *id.* 393.

[91] *Ex parte* Wall, 107 U. S. 265.

[92] Johnson *v.* Sayre, 158 U. S. 109.

[93] *Ex parte* Bain, 121 U. S. 1.

[94] 18 How. 272, 276.

'due process of law' were undoubtedly intended to convey the same meaning as the words 'by the law of the land' in *Magna Charta.* Lord Coke, in his commentary on those words,[95] says they mean due process of law. The constitutions, which had been adopted by the several states before the formation of the federal Constitution, following the language of the great charter more closely, generally contained the words, 'but by the judgment of his peers, or the law of the land.' . . . The Constitution contains no description of those processes which it was intended to allow or forbid. It does not even declare what principles are to be applied to ascertain whether it be due process. It is manifest that it was not left to the legislative power to enact any process which might be devised. The Article is a restraint on the legislative as well as on the executive and judicial powers of the government, and cannot be so construed as to leave Congress free to make any process due process of law by its mere will. To what principle, then, are we to resort to ascertain whether this process, enacted by Congress, is 'due process.' To this the answer must be twofold. We must examine the Constitution itself to see whether this process be in conflict with any of its provisions. If not found to be so, we must look to those settled usages and modes of proceeding existing in the common and statute law of England, before the emigration of our ancestors, and which are shown not to have been unsuited to their civil and political conditions by having been acted on by them after the settlement of this country.''[96] In a later case, Field, J., said

[95] 2 Inst. 50.

[96] In Holden *v.* Hardy, 169 U. S. 366, 385, which arose under the XIV Amendment, Brown, J., while quoting the language of Curtis, J., said that the court ''has not failed to recognize the fact that the law is, to a certain extent, a progressive science; that in some of the states methods of procedure, which at the time the Constitution was adopted were deemed essential to the protection and safety of the people, or to the liberty of the citizen, have been

that the words, "due process of law," mean "a course of legal proceedings, according to those rules and principles which have been established in our system of jurisprudence for the protection and enforcement of private rights. To give such proceedings any validity, there must be a tribunal competent by its constitution, that is, by the law of its creation, to pass upon the subject-matter of the suit; and, if that involves merely a determination of the personal liability of the defendant, he must be brought within its jurisdiction by service of process within the state, or by his voluntary appearance."[97] In conformity with these principles it has been held, that the trial of a citizen by military commission within a state where the courts are open and the course of justice unobstructed

found to be no longer necessary. . . . The whole fabric of special pleading, once thought to be necessary to the elimination of the real issue between the parties, has crumbled to pieces. . . . Witnesses are no longer incompetent by reason of interest, even though they be parties to the litigation. Indictments have been simplified, and an indictment for the most serious of crimes is now the simplest of all. In several of the states grand juries, formerly the only safeguard against a malicious prosecution, have been largely abolished, and in others the rule of unanimity, so far as applied to civil cases, has given way to verdicts rendered by a three-fourths majority. This case does not call for an expression of opinion as to the wisdom of these changes, or their validity under the XIV Amendment. . . . They are mentioned only for the purpose of calling attention to the probability that other changes of no less importance may be made in the future, and that while the cardinal principles of justice are immutable, the methods by which justice is administered are subject to constant fluctuation, and that the Constitution of the United States, which is necessarily and to a large extent inflexible and exceedingly difficult of amendment, should not be so construed as to deprive the states of the power to so amend their laws as to make them conform to the wishes of the citizens as they may deem best for the public welfare without bringing them into conflict with the supreme law of the land. Of course, it is impossible to forecast the character or extent of these changes, but in view of the fact that from the day Magna Charta was signed to the present moment, amendments to the structure of the law have been made with increasing frequency, it is impossible to suppose that they will not continue, and the law be forced to adapt itself to new conditions of society."

[97] Pennoyer *v.* Neff, 95 U. S. 714, 733.

is not due process of law.[98] It has also been held that there is a deprivation of liberty without due process of law when a court by its order, warrant, or commitment, holds a prisoner in custody, when the *prima facie* case against the prisoner does not show that he has committed an offense of which the court committing him can take cognizance, and in any such case of commitment by an inferior court of the United States the Supreme Court will issue a *habeas corpus* and discharge the prisoner.[99]

On the other hand, it has been held that the owner of property distrained and sold for non-payment of taxes due to the United States, is not deprived of his property without due process of law.[100] It has also been held that an officer of the United States, whose accounts, as settled by the auditing officers of the Treasury, show him to have neglected to account for and pay over public moneys received by him, is not deprived of his property without due process of law, when the Solicitor of the Treasury, in obedience to an act of Congress has issued a distress warrant under which the defaulting officer's real property has been taken in execution and sold by a marshal of the United States without further proceedings, judicial, or otherwise.[1]

[98] *Ex parte* Milligan, 4 Wall. 2.

[99] United States *v.* Hamilton, 3 Dall. 17; *Ex parte* Bollman and Swartwout, 4 Cr. 75; *Ex parte* Kearney, 7 Wheat. 38; *Ex parte* Wells, 18 How. 307; *Ex parte* Lange, 18 Wall. 163; *Ex parte* Parks, 93 U. S. 18; *Ex parte* Yarbrough, 110 U. S. 651; U. S. *v.* Waddell, 112 *id.* 76; Hans Nielsen, Petitioner, 131 *id.* 176; *In re* Swan, 150 *id.* 637; *In re* McKenzie, Petitioner, 180 *id.* 536. See also Cosgrove *v.* Winney, 174 *id.* 64.

[100] Springer *v.* U. S., 102 U. S. 586.

[1] Murray's Lessee *v.* H. L. & I. Co., 18 How. 272.

The constitutional requirement is designed to prevent the arbitrary exercise of the powers of government. See Sec. 117, *infra.* In trials within a court of justice the defendant must be given a hearing before judgment can be pronounced against his property or against himself, and the rights which are secured to him by other provisions of the Constitution, such as the right to trial by jury, must be held sacred. See Sec. 117, *infra; cf. Ex parte* Terry, 128 U. S. 289. But the requirement of due process of

The V Amendment—*(b)* Jeopardy, etc.

"Nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb." "Everybody agrees that the principle in its origin was a rule forbidding a trial in a new and independent case where a man had already been tried once."[2] Nevertheless there may be a second trial if the jury disagree,[3] or if a verdict against the prisoner is set aside on his motion for error at the trial.[4] But a prisoner in the Philippine Islands having been tried and acquitted by the court of the first instance, and upon appeal by the government, the finding of acquittal having been reversed by the appellate tribunal in the islands, and the prisoner sentenced to imprison-

law does not of itself control mere forms of procedure or require the following of any one course of action in all cases; the Amendment is complied with if, in each case, a procedure be adopted which is appropriate to the end sought: Hanover Nat. Bank *v.* Moyses, 186 U. S. 181. It is not necessary that the entire work of government be transacted in a court-room, in the presence of judge and jury. Congress may grant to executive officers the power to exclude or expel aliens: The Japanese Immigrant Case, 189 U. S. 86; U. S. *v.* Williams, 194 *id.* 279; *cf.* Wong Wing *v.* U. S., 163 *id.* 228; to exclude sub-standard proposed imports: Buttfield *v.* Stranahan, 192 U. S. 470; and to refuse delivery of mail to persons seeking to defraud: Public Clearing House *v.* Coyne, 194 U. S. 497. Taxes and assessments may be levied, and property may be taken for public use, by special commissions; and the Constitution is complied with when the taxpayer or property-owner is given an opportunity for a hearing at some stage of the proceedings: Bauman *v.* Ross, 167 U. S. 548; Wilson *v.* Lambert, 168 *id.* 611; Wight *v.* Davidson, 181 *id.* 371. So also, Congress may, in the ordinary course of legislation, prohibit the making of contracts in restraint of interstate commerce without thereby depriving any citizen of his liberty without due process of law: A. P. & S. Co. *v.* U. S., 175 U. S. 211. And Congress may impose an excise upon artificially coloured oleomargarine, although it does not tax butter which is artificially coloured, and although the effect of the tax is to suppress the manufacture of such oleomargarine: McCray *v.* U. S., 195 U. S. 27; Fuller, C. J., Brown and Peckham, JJ., dissenting. On congressional legislation, see also Mormon Church *v.* U. S., 136 U. S. 1.

[2] Per Holmes, J., Kepner *v.* U. S., 195 U. S. 100, 134.

[3] U. S. *v.* Perez, 9 Wheat. 579.

[4] Hopt *v.* People, 104 U. S. 631, 635; Hopt *v.* Utah, 110 *id.* 574; 114 *id.* 488, 492; 120 *id.* 430, 442; U. S. *v.* Ball, 163 *id.* 662, 672.

ment, the Supreme Court held[5] that the government's appeal twice put the prisoner in jeopardy. When a court imposes a fine and imprisonment as a punishment where the statute under which the prisoner was indicted conferred the power to punish by fine or imprisonment, and the fine has been paid, the court cannot modify its judgment by thereafter imposing imprisonment alone, for the judgment of the court having been executed so as to be a full satisfaction of one of the alternative penalties, the power of the court as to that offense is ended, and a second judgment on the same verdict, is, under such circumstances, void for want of power, and the party must be discharged.[6] So also where one of three defendants jointly indicted for murder has been acquitted and his associates have been convicted, upon a setting aside of the verdicts because of a defect in the indictment, the verdict of acquittal upon the merits is a bar to a second trial of the person acquitted; but the defendants who have availed themselves of the invalidity of the first indictment cannot, upon the granting of a new trial, claim that their lives are for a second time jeopardized.[7] Moreover, a court may, when necessary, discharge a jury from giving a verdict and order a trial by another jury, and the defendant is not thereby twice put in jeopardy within the meaning of the Constitution.[8]

The V Amendment also declares, that no person "shall be compelled, in any criminal case, to be a witness against himself." In Brown *v.* Walker,[9] it was held that this

[5] Kepner *v.* U. S., 195 U. S. 100; Holmes, White, and McKenna, JJ., dissenting.

[6] *Ex parte* Lange, 18 Wall. 163; *cf.* Callan *v.* Wilson, 127 U. S. 540, 557; Carter *v.* McClaughry, 183 *id.* 365.

[7] U. S. *v.* Ball, 163 U. S. 662.

[8] Thompson *v.* U. S., 155 U. S. 271. See also Dreyer *v.* Illinois, 187 *id.* 71.

[9] 161 U. S. 591.

provision does not protect a witness who refuses to answer a question when he is by law afforded absolute immunity, federal and state, for the offense to which the question relates. "The fact that the testimony may tend to degrade the witness in public estimation does not exempt him from the duty of disclosure."[10]

The provision that private property shall not be taken for public use without just compensation entitles a patentee to payment for the use of his invention,[11] and it entitles a corporation to compensation for the taking of a franchise to exact tolls as well as for the value of the tangible property taken;[12] but payment need not be made until the actual possession of land has passed,[13] benefits to the property left may be set off against damages for the property taken,[14] and compensation for an indirect injury to property need not be made.[15] Yet where, by the construction of a dam, the United States so floods lands belonging to an individual as to totally destroy its value, compensation must be rendered.[16] Congress does not deprive a contestant of a pre-emption entry on public lands of his property by confirming the title of the original entryman, for during the pendency of the contest the contestant has no vested right.[17]

The VI Amendment.

113. The VI Amendment declares that, "in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and

[10] P. 605. Four justices dissented.
[11] Belknap *v.* Schild, 161 U. S. 10.
[12] M. N. Co. *v.* U. S., 148 U. S. 312.
[13] Cherokee Nation *v.* S. K. Ry., 135 U. S. 641.
[14] Bauman *v.* Ross, 167 U. S. 548.
[15] Scranton *v.* Wheeler, 179 U. S. 141; Gibson *v.* U. S., 166 *id.* 269; Bedford *v.* U. S., 192 *id.* 217.
[16] U. S. *v.* Lynah, 188 U. S. 445; *cf.* Bedford *v.* U. S., 192 *id.* 217.
[17] Emblen *v.* L. L. Co., 184 U. S. 660.

district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favour, and to have the assistance of counsel for his defense." [18]

This Amendment, of course, applies only to criminal proceedings; [19] and the right to trial by jury may be waived by persons charged with minor offenses.[20] When the crime has been committed within the territories Congress may designate the place of trial at any time previous to the trial.[21] An indictment for sending obscene matter through the mail need not set forth the objectionable language in full.[22] The requirement that the prisoner "be confronted with the witnesses against him" will not invalidate a conviction in a case where the witnesses are absent by the procurement of the prisoner, or where enough has been proven to throw on him the burden of showing, and he having full opportunity therefor, fails to show, that he has not been instrumental in concealing or keeping away the witnesses, and ground having been thus laid, evidence is admissible against him of that which the witnesses testified at a previous trial on the same issue between the United States and the prisoner.[23] In the event of the death of witnesses for the prosecution, testimony given by those witnesses at a previous trial

[18] This Amendment is a restraint upon the judicial action of the United States, and not of the states: Twitchell *v.* The Commonwealth, 7 Wall. 321.

[19] U. S. *v.* Zucker, 161 U. S. 475; *Ex parte* Terry, 128 *id.* 289; Fong Yue Ting *v.* U. S., 149 *id.* 698; Wong Wing *v.* U. S., 163 *id.* 228; U. S. *v.* Williams, 194 *id.* 279.

[20] Schick *v.* U. S., 195 U. S. 65. Harlan, J., dissented.

[21] Cook *v.* U. S., 138 U. S. 157. See also Art. III, Sec. 2; *supra*, sec. 111.

[22] Rosen *v.* U. S., 161 U. S. 29.

[23] Reynolds *v.* U. S., 98 U. S. 145.

on the same issue is admissible;[24] but their evidence is not admissible when their absence is due to negligence of the officers of the government.[25] And in a trial for receiving stolen property, the record of the conviction of the thief cannot be admitted in evidence to prove the theft.[26]

The VII and VIII Amendments.

114. The VII Amendment declares, that, "in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved."[27] This Amendment does not affect equity causes in the federal courts, for the determination by a court of equity, according to its own course and practice of issues of fact, does not impair the right of trial by jury, because that right does not extend to causes of equitable jurisdiction.[28] Nor does this Amendment affect proceedings upon claims against the United States heard in the Court of Claims without the intervention of a jury, for the government being suable only by its own consent, may declare in what court it will be sued, and may prescribe the forms of pleading and rules of practice in that court, and such claims so prosecuted are not suits at common law.[29] Nor does it affect proceedings before a commission created for the purpose of hearing and deciding upon claims against a territorial municipal corporation which have no legal obligation, but which have such equity as

[24] Mattox *v.* U. S., 156 U. S. 237.

[25] Motes *v.* U. S., 178 U. S. 458.

[26] Kirby *v.* U. S., 174 U. S. 47.

[27] This Amendment is a restraint upon the exercise of powers by the United States, but not by the states: Edwards *v.* Elliott, 21 Wall. 532; Walker *v.* Sauvinet, 92 U. S. 90; Pearson *v.* Yewdall, 95 *id.* 294.

[28] Barton *v.* Barbour, 104 U. S. 126; Parsons *v.* Bedford, 3 Pet. 433, 446. But where a plaintiff has an appropriate remedy at law he cannot seek relief in a court of equity: Whitehead *v.* Shattuck, 138 U. S. 146; Cates *v.* Allen, 149 *id.* 451.

[29] McElrath *v.* U. S., 102 U. S. 426.

to cause provision to be made for their investigation and payment when found proper.[30] Nor does this Amendment relieve a party from the consequences of his antecedent voluntary relinquishment of a right of trial by jury in any particular cause, as, for instance, in the case of a banking corporation whose state charter stipulates that the bank should have a summary remedy by execution without jury trial for the collection of notes indorsed to it, and in express terms made negotiable at the bank.[31] Nor is the granting of a nonsuit for want of sufficient evidence an infringement of the constitutional rights of the plaintiff.[32] In all cases, however, in which the right of trial by jury is secured by the Constitution the jury must be unanimous in rendering its verdict.[33] The VII Amendment also declares that "no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law." As Story, J., said in Parsons *v.* Bedford,[34] "This is a prohibition to the courts of the United States to re-examine any facts tried by a jury in any other manner. The only modes known to the common law to re-examine such facts, are the granting of a new trial by the court where the issue was tried, or to which the record was properly returnable; or the award of a *venire facias de novo* by an appellate court, for some error of law which intervened in the proceedings." The Amendment obviously governs both the original and appellate jurisdiction of the courts of the United States, and forbids the reversal of a verdict of a jury save as above indicated. But facts tried by a jury before a justice of the peace

[30] Guthrie Nat. Bank *v.* Guthrie, 173 U. S. 528.

[31] Bank of Columbia *v.* Okely, 4 Wheat. 235.

[32] Coughran *v.* Bigelow, 164 U. S. 301.

[33] A. P. Co. *v.* Fisher, 166 U. S. 464; Springville *v.* Thomas, Salt Lake City *v.* Tucker, *ibid.* 707.

[34] 3 Pet. 447.

may be tried anew by a jury in the appellate court, for a trial by jury in the sense of the common law and of the VII Amendment involves the presence of a judge having the usual powers of superintending the course of the trial, instructing the jury on the law and advising them on the facts, and setting aside their verdict if in his opinion against the law or the evidence.[35] And a trial court may make its decision of a motion for a new trial depend upon a remission of part of the verdict.[36] On the other hand, Congress cannot by statute provide for the removal from a state court into a federal court of causes tried by jury in the state court, and for a retrial in the federal court of the facts and law in such action in the same manner as if the same had been originally commenced in the federal court.[37]

The VIII Amendment declares that "excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." This Amendment restricts national and not state legislative and judicial action.[38] Neither shooting to death,[39] nor electrocution,[40] as modes of inflicting the death penalty after trial, conviction, and sentence in a court of proper jurisdiction, nor a fine of fifty dollars and three months' imprisonment at hard labour for selling liquor in violation of law,[41] nor ten years' imprisonment for conspiracy to defraud, nor the infliction upon one prisoner of a heavier punishment than that inflicted upon another prisoner for an identical

[35] C. T. Co. *v.* Hof, 174 U. S. 1.

[36] A. V. L. & C. Co. *v.* Mann, 130 U. S. 69.

[37] The Justices *v.* Murray, 9 Wall. 274; C., B. & Q. R. *v.* Chicago, 166 U. S. 226.

[38] Pervear *v.* The Commonwealth, 5 Wall. 475; O'Neil *v.* Vermont, 144 U. S. 323.

[39] Wilkerson *v.* Utah, 99 U. S. 130.

[40] *In re* Kemmler, 136 U. S. 436.

[41] Pervear *v.* The Commonwealth, 5 Wall. 475.

offense,[42] can be regarded as a violation of the VIII Amendment.

The first ten Amendments were proposed by the first Congress for adoption by the states and were intended to constitute a federal Bill of Rights. These Amendments constitute restrictions upon the United States and they are obviously not restrictions upon the legislative or judicial powers of the states.

The XI Amendment.

115. The Supreme Court having, in Chisholm *v.* Georgia,[43] affirmed its orginal jurisdiction in actions brought by citizens of one state against another state, in 1797 the XI Amendment was adopted, declaring that "the judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state." That Amendment having taken effect on 8th January, 1798, in that year the Supreme Court decided in Hollingsworth *v.* Virginia,[44] that the Amendment barred any further proceedings in cases then depending in the courts of the United States in which a citizen of one state was the plaintiff, and another state was the defendant. In Osborn *v.* Bank of U. S.,[45] Marshall, C. J., said: "The XI Amendment . . . is of necessity limited to those suits in which a state is a party to the record," but he added,[46] "the state not being a party to the record, and the court having jurisdiction over those who are parties on the record, the true question is not one of jurisdiction,

[42] Howard *v.* Fleming, 191 U. S. 126.
[43] 2 Dall. 419.
[44] 3 Dall. 378.
[45] 9 Wheat. 738, 857.
[46] P. 858.

but whether in the exercise of its jurisdiction, the court ought to make a decree against the defendants; whether they are to be considered as having a real interest, or as being only nominal defendants.'' On the other hand he said,[47] ''This suit is not against the state of Ohio within the view of the Constitution, the state being no party on the record.'' The jurisdictional question in the cause was as to the power of the court to take cognizance of a suit in equity brought by the Bank of the United States against the auditor of the state of Ohio to enjoin the collection of a tax on the business of the bank imposed by a statute of Ohio, and to recover a sum of money wrongfully taken out of the vaults of the bank by the state auditor by way of enforcing the payment of the tax, and the court sustained the jurisdiction on the grounds stated by the chief justice. In view of the judgment in the cause and the dicta of the chief justice, it was not unnatural that the presence or absence of a state as a party defendant on the record should have been regarded as the criterion by which to determine whether or not a suit was within the purview of the XI Amendment. Indeed in Davis *v.* Gray,[48] the court went so far as to hold that a receiver of a railway could sue in equity the governor of the state incorporating the railway and the land commissioner of the state to restrain the issue of patents to individuals for certain lands theretofore granted by the state to the railway on certain conditions, and resumed by the state for alleged non-performance of the condition, and that it not being possible to make the state a party the plaintiff's rights could be vindicated by a decree against the officers of the state, but the later decisions of the court have tended toward the establishment of a sounder rule on this subject; and it is now settled, that the criterion is not the

[47] P. 868.
[48] 16 Wall. 203.

presence or absence of the state as a party defendant on the record, but the question of fact, is or is not the suit in substance, though not in form, a suit by a citizen of another state against a state? If a state be either a defendant on the record, or the real defendant though not a party on the record, the XI Amendment forbids the court to take jurisdiction of the cause, unless the state by its voluntary appearance, as in Clark *v.* Barnard,[49] submits itself to the jurisdiction of the court. In conformity with this view it has been held that a suit by, or against, the governor of a state in his representative capacity is a suit against the state;[50] that the XI Amendment prohibits a suit in the federal courts against the officers of a state to enforce the performance of a contract made by the state, where the controversy is as to the validity and obligation of the contract, and where the remedy sought is a performance of the contract by the state, the nominal defendants having no personal interest in the subject-matter;[51] it has also been held that where a state had bought a railway from a receiver appointed at its instance, as the holder of the first mortgage bonds of the railway, the holders of junior bonds having filed a bill to foreclose their mortgage and to set aside the sale to the state, making the governor and treasurer of the state parties defendant, the state being a necessary party to the relief sought, the XI Amendment barred the suit;[52] and that state officers cannot be compelled, at the suit of a citizen of another state, to appropriate the public money

[49] 108 U. S. 436, 447.

[50] Georgia *v.* Brailsford, 2 Dall. 402; The Governor of Georgia *v.* Madrazo, 1 Pet. 110; Kentucky *v.* Dennison, 24 How. 66.

[51] Hagood *v.* Southern, 117 U. S. 52; Governor of Georgia *v.* Madrazo, 1 Pet. 110; Louisiana *v.* Jumel, 107 U. S. 711; North Carolina *v.* Temple, 134 *id.* 22; Louisiana *v.* Steele, *ibid.* 230. See also Chandler *v.* Dix, 194 *id.* 590.

[52] Cunningham *v.* M. & B. R., 109 U. S. 446.

of the state in a way prohibited by the laws of the state, for such a suit is in fact against the state, and where a state cannot be sued, the court cannot assert jurisdiction over the officers of the state, so as to control them in their administration of the finances of the state.[53] It has also been held that the XI Amendment bars a suit by one state against another state, where the plaintiff state sues, not in its own right, but only for the benefit of certain of its citizens who have assigned to it their claims against the state defendant;[54] that a private person cannot bring a personal suit in the Supreme Court of the United States against a state to recover the proceeds of property in the possession of that state, such as the proceeds of certain slaves alleged to have been illegally seized by the state,[55] and, in the case of *In re* Ayers,[56] that the XI Amendment forbids the court to take jurisdiction of a bill in equity filed by a holder of, and dealer in, coupons of the bonds of the state, the coupons under the statutes of the state and the judgments of the court being receivable in payment of state taxes, to enjoin the officers of a state from prosecuting, on behalf of the state, actions against citizens of the state for collection of taxes, under a statute of the state directing the prosecution of the actions, and providing that "if the defendant relies on a tender of coupons as payment of the taxes claimed, he shall plead the same specifically and in writing, and file with the plea the coupons averred therein to have been tendered," and "the burden of proving the tender and the genuineness of the coupons shall be on the defendants;" the equity set up by the plaintiffs in the injunction suit being that they had

[53] Louisiana *v.* Jumel, 107 U. S. 711.

[54] New Hampshire *v.* Louisiana, New York *v.* Louisiana, 108 U. S. 76; *cf.* South Dakota *v.* North Carolina, 192 *id.* 286.

[55] *Ex parte* Madrazzo, 7 Pet. 627; The Governor of Georgia *v.* Madrazo, 1 Pet. 110.

[56] 123 U. S. 443.

purchased coupons for the purpose of dealing in them and selling them to taxpayers to use in payment of taxes to the state, and that, unless the action threatened by the state officers were enjoined, the plaintiffs would not be able to sell their coupons at a profit. So, also, suit cannot be maintained against a state officer to compel the levying of a special tax for the benefit of bondholders.[57] On the other hand, it has been held that the Amendment does not protect from suit a county of a state,[58] nor prohibit the exercise by the court of its appellate jurisdiction over state courts in cases of criminal cognizance, for the purchase or prosecution of a writ of error to reverse a criminal conviction at the prosecution of the state is not the commencement or prosecution of a suit at law against that state;[59] nor does the XI Amendment prohibit the exercise by the court of jurisdiction over a controversy between individuals as to land granted by and claimed under a state;[60] nor does the fact that a state is a, or the sole, shareholder in a banking corporation prevent the courts of the United States from taking cognizance of a suit against such a corporation,[61] for, as Marshall, C. J., said,[62] "when a government becomes a partner in any trading company, it divests itself, so far as concerns the transactions of that company, of its sovereign character, and takes that of a private citizen." Nor does the fact that a

[57] N. C. *v.* Temple, 134 U. S. 22; Louisiana *v.* Steele, *ibid.* 230. And, although it is not forbidden by the Amendment, a suit against a state cannot be brought by one of its own citizens, nor by a corporation created by the federal government, even when a federal question is involved: Hans *v.* Louisiana, 134 U. S. 1; Smith *v.* Reeves, 178 *id.* 436.

[58] Lincoln County *v.* Luning, 133 U. S. 529.

[59] Cohens *v.* Virginia, 6 Wheat. 264.

[60] Fowler *v.* Lindsey, 3 Dall. 411.

[61] L., C. & C. R. *v.* Letson, 2 How. 497, 550; Bank of U. S. *v.* Planters' Bank, 9 Wheat. 904, 907; Bank of Kentucky *v.* Wister, 2 Pet. 318, 323; Briscoe *v.* Bank of Kentucky, 11 Pet. 257, 324; Curran *v.* Arkansas, 15 How. 304, 309.

[62] 9 Wheat. 907.

state claims property, which is not in its own possession but in the possession of an individual who has been made defendant in an action to recover that property, oust the jurisdiction of the court of the United States, nor forbid the court to give judgment in favour of the plaintiff.[63] It is likewise well settled, that "when a plain official duty, requiring no exercise of discretion, is to be performed" by an officer of a state, "and performance is refused, any person who will sustain personal injury by such refusal may have a *mandamus* to compel its performance; and when such duty is threatened to be violated by some positive official act," of an officer of a state, "any person who will sustain personal injury thereby, for which adequate compensation cannot be had at law, may have an injunction to prevent it," [64] or he may maintain an action at law for damages against the officer as a wrongdoer. "In either case, if the officer plead the authority of an unconstitutional law for the non-performance or violation of his duty, it will not prevent the issuing of a writ. An unconstitutional law will be treated by the courts as null and void." [65] In conformity with this principle, it has been held that the XI Amendment does not forbid the

[63] U. S. *v.* Peters, 5 Cr. 115.

[64] Per Bradley, J., in Board of Liquidation *v.* McComb, 92 U. S. 531, 541.

[65] Per Bradley, J., in Board of Liquidation *v.* McComb, 92 U. S. 541; Davis *v.* Gray, 16 Wall. 203; McGahey *v.* Virginia, 135 U. S. 662; Hans *v.* Louisiana, 134 *id.* 1; Pennoyer *v.* McConnaughy, 140 *id.* 1; Smyth *v.* Ames, 169 *id.* 466; Prout *v.* Starr, 188 *id.* 537; *cf.* Fitts *v.* McGhee, 172 *id.* 516; I. C. R. *v.* Adams, 180 *id.* 28. In Hans *v.* Louisiana, *supra,* Bradley, J., said, p. 20: "Although the obligations of a state rest for their performance upon its honour and good faith, and cannot be made the subjects of judicial cognizance unless the state consents to be sued, or comes itself into court; yet where property or rights are enjoyed under a grant or contract made by a state, they cannot wantonly be invaded. Whilst the state cannot be compelled by suit to perform its contracts, any attempt on its part to violate property or rights acquired under its contracts, may be judicially resisted; and any law impairing the obligation of contracts under which such property or rights are held is void and powerless to affect their enjoyment."

courts of the United States to take cognizance of a cause wherein a federal agency, as, for instance, a national bank, brings suit against the officers of a state to enjoin the enforcement of an unconstitutional law of the state taxing that agency.[66] It has also been held that state officers may be enjoined at the suit of a holder of consolidated bonds of the state which had been issued under an agreement for the funding of the debt of the state, from issuing others of the consolidated bonds in violation of the contract between the state and its bondholders;[67] and that an action brought by a taxpayer against an officer of a state to recover possession of property which that officer has wrongfully seized under an unconstitutional law of the state for non-payment of taxes is an action against that officer as a wrongdoer, and not such an action as is prohibited by the XI Amendment.[68]

As the immunity from suit is a personal privilege, the state may waive that privilege, and it does waive it, when, in a cause pending in a court of the United States, in which it has a sufficient interest to entitle it to become a party defendant, it causes an appearance to be entered by counsel on its behalf, for such an appearance is a voluntary

[66] Osborn *v.* The Bank of the United States, 9 Wheat. 738, 846.

[67] Board of Liquidation *v.* McComb, 92 U. S. 531.

[68] The Virginia Coupon Cases, 114 U. S. 269, 284. Some of the cases were actions of trespass or detinue; others of them were bills in equity for an injunction. Bradley, J., with whom concurred Waite, C. J., and Miller and Gray, JJ., dissented. Upon a like principle, it has been held that officers of the United States being wrongfully in possession of land, the fact that they held that possession not for themselves but for the government of the United States will not forbid courts to take jurisdiction of the rightful owner's action to recover his land, nor prevent judgment in his favour, if his title be made out: Meigs *v.* McClung's Lessee, 9 Cr. 11; Wilcox *v.* Jackson, 13 Pet. 498; Grisar *v.* McDowell, 6 Wall. 363; Brown *v.* Huger, 21 How. 305; United States *v.* Lee, 106 U. S. 196. In Mitchell *v.* Harmony, 13 How. 115, and in Bates *v.* Clark, 95 U. S. 204, the same rule was applied in actions of trespass against military officers of the United States for the wrongful seizure of certain personal property of the plaintiffs, in obedience to unlawful orders from a military superior.

submission to the jurisdiction of the court.[69] It is obvious that the XI Amendment does not affect the jurisdiction granted by the III Article to the courts of the United States in actions wherein a foreign state, or one of the United States, is the plaintiff and one of the United States is the defendant.[70]

The relations between the federal and state courts.

116. The federal supremacy prevents the states from regulating the process or practice of the courts of the United States at law,[71] or in equity,[72] or in causes of criminal cognizance,[73] but "the laws of the several states, except when the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States in cases where they apply."[74] The federal supremacy also forbids the courts of the states to refuse obedience to a mandate of the Supreme Court of the United States, reversing a judgment of a state court in a cause which is of federal cognizance;[75] and it prevents a state legislature from annulling by statute the judgment of a court of the United States in a cause which is within the jurisdiction of the

[69] Clark *v.* Barnard, 108 U. S. 436.

[70] U. S. *v.* Texas, 143 U. S. 621.

[71] Wayman *v.* Southard, 10 Wheat. 1; Bank of U. S. *v.* Halstead, *ibid.* 51; Lincoln *v.* Power, 151 U. S. 436.

[72] Borer *v.* Chapman, 119 U. S. 587; Mississippi Mills *v.* Cohn, 150 *id.* 202; Hollins *v.* B. C. & I. Co., *ibid.* 371.

[73] U. S. *v.* Reid, 12 How. 361.

[74] Act of 24th September, 1789, c. 20, sec. 34, 1 Stat. 92; Rev. Stat. sec. 721. See Field's Federal Courts, p. 430. The general principle that the *lex fori* governs the limitation of actions applies to actions brought originally in the courts of the United States, and also to actions removed thereto from the courts of the states: Arnson *v.* Murphy, 109 U. S. 238; Mitchell *v.* Clark, 110 *id.* 633.

[75] Martin *v.* Hunter's Lessee, 1 Wheat. 304.

court.[76] While a state cannot confer jurisdiction on a court of the United States, yet a state may by its legislation create legal and equitable rights which can be enforced in a court of the United States in a cause whereof that court has acquired jurisdiction by reason of either the citizenship of the parties or the federal character of the subject-matter of litigation; thus, pilotage being a subject of admiralty and, therefore, of federal jurisdiction, a pilot may sue in a court of the United States to recover pilotage under a state statute;[77] and the right under a state statute to recover damages for a death caused by negligence is enforcible in a cause between proper parties in a court of the United States;[78] and liens created by state laws in favour of material men for supplies furnished to vessels in their home ports or for materials furnished to ships in process of construction may be enforced in the courts of the United States.[79]

A court of the United States cannot enjoin proceedings in a court of a state,[80] save in aid of bankruptcy proceedings pending in a court of the United States, or as a means of preventing the enforcement in a court of a state

[76] U. S. *v.* Peters, 5 Cr. 115.

[77] Hobart *v.* Drogan, 10 Pet. 108; *Ex parte* McNiel, 13 Wall. 236.

[78] Ry. Co. *v.* Whitton, 13 Wall. 270.

[79] Edwards *v.* Elliott, 21 Wall. 532; The Lottawanna, *ibid.* 558; U. S. *v.* P.-D. M. Co., 176 U. S. 317; *cf.* The Roanoke, 189 *id.* 185. Where the jurisdiction of a court of the United States has attached, a party to the suit who refuses or neglects to obey its process will be liable in damages to any party injured by such neglect or refusal: Amy *v.* Supervisors, 11 Wall. 136; and a trustee of property to which the jurisdiction of a court of the United States has attached will be held personally responsible if, without adequate resistance, he surrenders such property to the process of a court of a state: Chittenden *v.* Brewster, 2 Wall. 191. See also *In re* Watts and Sachs, 190 U. S. 1.

[80] Diggs *v.* Wolcott, 4 Cr. 179; Watson *v.* Jones, 13 Wall. 679; Haines *v.* Carpenter, 91 U. S. 254; Dial *v.* Reynolds, 96 *id.* 340; Leroux *v.* Hudson, 109 *id.* 468; Byers *v.* McAuley, 149 *id.* 608; Harkrader *v.* Wadley, 172 *id.* 148; *cf.* *In re* Neagle, 135 *id.* 1; Cole *v.* Cunningham, 133 *id.* 107. See also *In re* Watts and Sachs, 190 *id.* 1.

of a judgment entered therein after a cause has been properly removed to a court of the United States;[81] nor can the courts of the United States issue writs of *mandamus* to courts of the states, except to compel the performance of purely ministerial,[82] and not judicial,[83] duties.

Chattels taken in execution under the judgment of a court of a state and delivered to a claimant upon his giving bond therefor cannot be seized by a marshal under the process of a court of the United States.[84] A court of the United States exercising jurisdiction in bankruptcy cannot divest liens upon the bankrupt's property created by the judgments, either interlocutory or final, of the courts of the states;[85] the assets of the estate of an insolvent decedent in process of judicial administration under the order of a probate court of a state are not subject to levy under an execution issued by a court of the United States;[86] and the trustee appointed by a court of a state under a state statute to liquidate a corporation whose charter has been forfeited cannot be sued in a court of the United States by creditors of the corporation to compel his allowance of a claim against the corporation.[87]

As Catron, J., said in the judgment in the case of The Bank of Alabama *v.* Dalton,[88] "In administering justice . . . the states of this Union act independently of each other, and their courts are governed by the laws and municipal regulations of that state, where a remedy is

[81] French *v.* Hay, 22 Wall. 250; Dietzsch *v.* Huidekoper, 103 U. S. 494.

[82] Riggs *v.* Johnson County, 6 Wall. 166; Amy *v.* Supervisors, 11 *id.* 136; Supervisors *v.* U. S., 154 U. S. 576.

[83] *In re* Blake, 175 U. S. 114. See also The Mayor *v.* Lord, 9 Wall. 409; The Supervisors *v.* Durant, *ibid.* 415; Bath County *v.* Amy, 13 *id.* 244.

[84] Hagan *v.* Lucas, 10 Pet. 400.

[85] Peck *v.* Jenness, 7 How. 612.

[86] Williams *v.* Benedict, 8 How. 107.

[87] Peale *v.* Phipps, 14 How. 368. See also Vaughan *v.* Northup, 15 Pet. 1; Wiswall *v.* Sampson, 14 How. 52; *cf.* Erwin *v.* Lowry, 7 How. 172.

[88] 9 How. 522, 527.

sought, unless they are controlled by the Constitution of the United States, or by laws enacted under its authority.'' The most important of the restraints imposed by the Constitution upon the exercise of judicial jurisdiction by the states result from the grant in Article III of the Constitution, of judicial power to the United States over certain subjects of jurisdiction, and from the power of Congress to render that jurisdiction exclusive. Nevertheless, as the Constitution, laws, and treaties of the United States are ''the supreme law of the land,'' the states, wherever Congress has not, by legislation within the limits of its constitutional powers, excepted any subject from the jurisdiction of their courts, may exercise jurisdiction therein, and, in such cases, rights arising under the Constitution, laws, and treaties of the United States may be administered, subject, of course, to the appellate jurisdiction of the Supreme Court of the United States, and to the power of removal to the federal courts of the first instance; thus, a tribunal constituted by a state may enforce the militia laws of the United States;[89] and an assignee in bankruptcy may sue in a court of a state to recover the assets of the bankrupt.[90] But where Congress has expressed its will that the courts of the United States shall exercise exclusive jurisdiction over any subject-matter which is included within the constitutional grant of judicial power to the United States, the courts of the states cannot directly exercise judicial jurisdiction over such subject-matter. Upon this principle, a court of a state cannot take cognizance of an act declared to be criminal by the statutes of the United States, unless that act be

[89] Houston *v.* Moore, 5 Wheat. 1.

[90] Claflin *v.* Houseman, 93 U. S. 130; Teal *v.* Felton, 12 How. 284, referred to by Bradley, J., 93 U. S. 142, was an action of trover for a newspaper which a postmaster wrongfully refused to deliver. See also Eyster *v.* Gaff, 91 U. S. 521; *Ex parte* Christy, 3 How. 292, 318, 319; Nugent *v.* Boyd, *ibid.* 426; Williams *v.* Heard, 140 U. S. 529.

also an offense against the laws of the state.[91] A state court cannot take jurisdiction of a cause of admiralty cognizance,[92] such as a proceeding *in rem* founded upon a contract for the transportation of passengers by sea, or upon a collision,[93] or upon a contract of affreightment,[94] but a state court may take jurisdiction of an action *in personam* for mariners' wages,[95] or of a proceding *in rem* founded upon a lien given by a state statute for materials supplied in building a ship,[96] for such actions are not necessarily of admiralty cognizance. A state court cannot take jurisdiction of an action at law against a foreign consul.[97] A state court cannot take jurisdiction in patent causes, nor determine the validity of a patent, or a question of infringement,[98] but a state court may incidentally pass upon the validity of a patent, as, for instance, where

[91] There is a concurrent jurisdiction over crimes, when the criminal act is an offense against the laws of both the United States and of the states; thus, a state may punish the offense of uttering or passing false coin as a fraud practiced on its citizens: Fox *v.* Ohio, 5 How. 432, and the United States may punish the same act as a crime against it: United States *v.* Marigold, 9 How. 560. In the same way, a state might have, before the adoption of the XIII Amendment, punished the harbouring of a fugitive slave: Moore *v.* Illinois, 14 How. 13, while the same act could have been punished in the courts of the United States as an offense against the fugitive slave legislation of Congress. So also a state may punish the forging of a promissory note, although the forger commits the further crime of making false entries concerning such notes on the books of a national bank: Cross *v.* North Carolina, 132 U. S. 131. And a state may punish the murder of a locomotive engineer, although his death be caused by the derailment of a train carrying the mails of the United States: Crossley *v.* California, 168 U. S. 640. But it may not punish an officer of a national bank who, knowing that the bank is insolvent, nevertheless receives a deposit: Easton *v.* Iowa, 188 U. S. 220.

[92] The Moses Taylor, 4 Wall. 411; Moran *v.* Sturges, 154 U. S. 256.

[93] The Hine *v.* Trevor, 4 Wall. 555.

[94] The Belfast, 7 Wall. 624.

[95] Leon *v.* Galceran, 11 Wall. 185.

[96] Edwards *v.* Elliott, 21 Wall. 532.

[97] Davis *v.* Packard, 7 Pet. 276.

[98] Rev. Stat., sec. 711. Per Bradley, J., in Claflin *v.* Houseman, 93 U. S. 140.

it is questioned in an action for the price of the patent.[99] The distinction running through the cases is, that, where Congress has excepted from the action of the courts of the states any subject-matter of federal jurisdiction as designated in the Constitution, the courts of the states thenceforth cannot directly, but may indirectly and collaterally, act upon such subject-matter. The courts of the states cannot issue an injunction before final decree, nor an attachment on *mesne* process, against a national bank.[100] The federal supremacy forbids a court of a state to issue a *mandamus* to an officer of the United States,[1] or to try a federal officer for an act done by him in the discharge of his official duties,[2] or, by its process, to take in execution goods imported into a port of the United States, but not yet entered at the custom-house for payment of duties to the United States,[3] or goods, which, having been seized for violation of the revenue laws of the United States, are in the custody of a marshal of the United States.[4] Nor can a court of a state take jurisdiction of a suit to determine whether or not property has been rightfully forfeited under the laws of the United States.[5] Nor can it take jurisdiction of a complaint for perjury in testifying before a local notary public upon a contested congressional election.[6] Nor can a court of a state by injunction restrain the execution of a judgment of a court of the United States;[7] nor, under a state insolvent law,

[99] See the judgment of Gray, J., in Nash *v.* Lull, 102 Mass. 60; *cf.* Marsh *v.* N., S. & Co., 140 U. S. 344; Holt *v.* I. Mfg. Co., 176 *id.* 68.

[100] Rev. Stat. 5242; Pacific Nat. Bank *v.* Mixter, 124 U. S. 721.

[1] McClung *v.* Silliman, 6 Wheat. 598.

[2] *In re* Neagle, 135 U. S. 1; Etheridge *v.* Sperry, 139 *id.* 266; Ohio *v.* Thomas, 173 *id.* 276; Boske *v.* Comingore, 177 *id.* 459. See also Gableman *v.* P., D. & E. Ry., 179 *id.* 335.

[3] Harris *v.* Dennie, 3 Pet. 292.

[4] Slocum *v.* Mayberry, 2 Wheat. 1.

[5] Gelston *v.* Hoyt, 3 Wheat. 246.

[6] *In re* Loney, 134 U. S. 372.

[7] McKim *v.* Voorhies, 7 Cr. 279.

regulate the distribution of assets of an insolvent national bank;[8] nor discharge a defendant held in custody under a *capias ad satisfaciendum* issued by a court of the United States;[9] nor replevy property taken in execution under a judgment of a court of the United States;[10] nor order the release, after a hearing on *habeas corpus,* of a prisoner held in custody by an officer of the United States under a warrant of commitment from a commissioner of a circuit court of the United States upon a charge of the commission of an offense against the laws of the United States, or of a prisoner held in custody by the United States after a trial and conviction in a court of the United States of an offense against the laws of the United States;[11] nor release upon *habeas corpus* an enlisted soldier in the army of the United States, detained in custody under the order of his commanding officer.[12] Nor can an attachment of a debt by the process of a state court, after the commencement of a suit upon that debt in a court of the United States bar the plaintiff's recovery in that suit;[13] nor can the pendency of state insolvent proceedings be set up as a bar to suits in the courts of the United States brought by parties who are constitutionally entitled to sue therein.[14]

[8] Davis *v.* Elmira Savings Bank, 161 U. S. 275; *cf.* Earle *v.* Conway, 178 *id.* 456.

[9] Duncan *v.* Darst, 1 How. 301.

[10] Freeman *v.* Howe, 24 How. 450; Covell *v.* Heyman, 111 U. S. 176.

[11] Ableman *v.* Booth, 21 How. 506.

[12] Tarble's Case, 13 Wall. 397. A state court may, nevertheless, by process of *habeas corpus,* inquire into the legality of the detention of a person, who, having been arrested as a fugitive from the justice of another state, is detained in custody by an agent of that other state under a warrant issued by the governor of the state within whose territory the alleged fugitive has come: Robb *v.* Connolly, 111 U. S. 624.

[13] Wallace *v.* McConnell, 13 Pet. 136.

[14] Suydam *v.* Broadnax, 14 Pet. 67; Hyde *v.* Stone, 20 How. 170; Green *v.* Creighton, 23 *id.* 90.

In the cases of persons who, or of property which, may be subject to the jurisdiction of the courts of the United States, and also to that of the courts of the states, that jurisdiction, which first actually attaches either to the person or the property, will retain control and cannot be divested by process issued from the other jurisdiction.[15] An officer who, in executing the process issued by a court in a cause within its jurisdiction, seizes property which that process specifically designates, is not liable to action therefor in a court of another jurisdiction; but an officer who, under a judgment *in personam,* seizes property not specifically designated in the process is liable, and may

[15] Slocum *v.* Mayberry, 2 Wheat. 1; Smith *v.* McIver, 9 *id.* 532; Hagan *v.* Lucas, 10 Pet. 400; Wallace *v.* McConnell, 13 *id.* 136; Erwin *v.* Lowry, 7 How. 172; Peck *v.* Jenness, *ibid.* 612; Williams *v.* Benedict, 8 *id.* 107; Wiswall *v.* Sampson, 14 *id.* 52; Peale *v.* Phipps, *ibid.* 368; Pulliam *v.* Osborne, 17 *id.* 471; Taylor *v.* Carryl, 20 *id.* 583; Freeman *v.* Howe, 24 *id.* 450; Covell *v.* Heyman, 111 U. S. 176; Heidritter *v.* Elizabeth Oil-cloth Co., 112 *id.* 294; Cross *v.* North Carolina, 132 *id.* 131; R. G. R. *v.* Gomila, *ibid.* 478; L. C. Co. *v.* McCreery, 141 *id.* 475; *In re* Tyler, 149 *id.* 164; Byers *v.* McAuley, *ibid.* 608; Central Nat. Bank *v.* Stevens, 169 *id.* 432; Harkrader *v.* Wadley, 172 *id.* 148; White *v.* Schloerb, 178 *id.* 542; *cf.* Etheridge *v.* Sperry, 139 *id.* 266; Bock *v.* Perkins, *ibid.* 628; Moran *v.* Sturges, 154 *id.* 256; Earle *v.* Pennsylvania, 178 *id.* 449; Earle *v.* Conway, *ibid.* 456. In Covell *v.* Heyman, 111 U. S. 182, Matthews, J., said: "The forbearance which courts of co-ordinate jurisdiction, administered under a single system, exercise toward each other, whereby conflicts are avoided, by avoiding interference with the process of each other, is a principle of comity, with, perhaps, no higher sanction than the utility which comes from concord; but between state courts and those of the United States it is something more. It is a principle of right and of law, and, therefore, of necessity. It leaves nothing to discretion or mere convenience. These courts do not belong to the same system, so far as their jurisdiction is concurrent; and although they co-exist in the same space, they are independent, and have no common superior. They exercise jurisdiction, it is true, within the same territory, but not in the same plane; and when one takes into its jurisdiction a specific thing, that *res* is as much withdrawn from the judicial power of the other as if it had been carried physically into a different territorial sovereignty. To attempt to seize it by a foreign process is futile and void. The regulation of process, and the decision of questions relating to it, are part of the jurisdiction of the court from which it issues."

be sued therefor in a court of another jurisdiction,[16] and the party injured by such a wrongful act by a marshal of the United States may sue on the marshal's official bond;[17] or, he may file a bill in the federal court to restrain or regulate its judgment.[18]

The XIV Amendment as affecting state judicial proceedings.

117. The exercise of judicial jurisdiction by the states is also restricted by that provision of the XIV Amendment which declares, "Nor shall any state deprive any person of life, liberty, or property without due process of law." Within the meaning of the Constitution, this due process of law is secured when the laws operate on all alike and no one is subjected to an arbitrary exercise of the powers of government.[19] The provision "does not control mere forms of procedure in the state courts or regulate practice therein. All its requirements are complied with provided in the proceedings which are claimed not to have been due process of law the person condemned has had sufficient notice and adequate opportunity has been afforded him to defend."[20] In proceedings *in personam* service must be made within the state unless the defendant voluntarily appears;[21] in proceedings *in*

[16] Slocum *v.* Mayberry, 2 Wheat. 1; Day *v.* Gallup, 2 Wall. 97; Buck *v.* Colbath, 3 *id.* 334.

[17] Lammon *v.* Feusier, 111 U. S. 17.

[18] Krippendorf *v.* Hyde, 110 U. S. 276.

[19] Caldwell *v.* Texas, 137 U. S. 692; Leeper *v.* Texas, 139 *id.* 462; Giozza *v.* Tiernan, 148 *id.* 657; I. C. Ry. *v.* Iowa, 160 *id.* 389; Tonawanda *v.* Lyon, 181 *id.* 389; Detroit *v.* Parker, *ibid.* 399.

[20] L. & N. R. *v.* Schmidt, 177 U. S. 230; see also *In re* Kemmler, 136 *id.* 436; *cf.* Simon *v.* Craft, 182 *id.* 427.

[21] Boswell's Lessee *v.* Otis, 9 How. 336; Harris *v.* Hardeman, 14 *id.* 334; Nations *v.* Johnson, 24 *id.* 195; York *v.* Texas, 137 U. S. 15; Kauffman *v.* Wooters, 138 *id.* 285; Dewey *v.* Des Moines, 173 *id.* 193; Roller *v.* Holly, 176 *id.* 398; *cf.* Gallup *v.* Schmidt, 183 *id.* 300.

rem the *res* must be within the jurisdiction and constructive notice of the proceedings must be given.[22] A state may regulate its judicial proceedings,[23] provided that it does not discriminate against classes of citizens. A state may therefore restrain or take away the right of trial by jury in civil cases;[24] or it may permit the prosecution of crimes by information after examination and commitment by a magistrate;[25] or it may provide for the trial of criminal cases by a struck jury,[26] or by a jury composed of eight instead of twelve jurors;[27] or it may permit a person charged with murder to waive the right of trial by jury;[28] or it may permit a court to enjoin the commission of a crime and then punish its commission by contempt proceedings without the intervention of a jury;[29] or it may even provide that any person may summarily destroy, without judicial proceedings, fishing nets that have been placed in public streams in defiance of statute.[30]

A state may freely prescribe the jurisdiction of its

[22] Arndt *v.* Griggs, 134 U. S. 316; see also Hanover Nat. Bank *v.* Moyses, 186 *id.* 181; *cf.* Ro Bards *v.* Lamb, 127 *id.* 58. But a court may not, by any proceedings, grant administration of the estate of a living person: Scott *v.* McNeal, 154 U. S. 34.

[23] Duncan *v.* Missouri, 152 U. S. 377; Holden *v.* Hardy, 169 *id.* 366; Backus *v.* F. S. U. D. Co., *ibid.* 557; Brown *v.* New Jersey, 175 *id.* 172; L. & N. R. *v.* Schmidt, 177 *id.* 230; Freeland *v.* Williams, 131 *id.* 405; L. & N. R. *v.* Woodson, 134 *id.* 614; Natal *v.* Louisiana, 139 *id.* 621; Andrews *v.* Swartz, 156 *id.* 272; Lowe *v.* Kansas, 163 *id.* 81; Jones *v.* Brim, 165 *id.* 180; Nobles *v.* Georgia, 168 *id.* 398. See also Minder *v.* Georgia, 183 *id.* 559.

[24] Walker *v.* Sauvinet, 92 U. S. 90; Church *v.* Kelsey, 121 *id.* 282; *cf.* I. C. Ry. *v.* Iowa, 160 *id.* 389.

[25] Hurtado *v.* California, 110 U. S. 517; McNulty *v.* California, 149 *id.* 645; Hodgson *v.* Vermont, 168 *id.* 262; Bolln *v.* Nebraska, 176 *id.* 83; Maxwell *v.* Dow, *ibid.* 581; Davis *v.* Burke, 179 *id.* 399.

[26] Brown *v.* New Jersey, 175 U. S. 172.

[27] Maxwell *v.* Dow, 176 U. S. 581.

[28] Hallinger *v.* Davis, 146 U. S. 314.

[29] Eilenbecker *v.* Plymouth County, 134 U. S. 31; *cf.* *In re* Debs, 158 *id.* 564; Tinsley *v.* Anderson, 171 *id.* 101.

[30] Lawton *v.* Steele, 152 U. S. 133.

several courts, both as to their territorial limits and the subject-matter, amount and finality of their respective judgments and decrees, and it may vest in one court final appellate jurisdiction over the courts of certain counties, and in another court the like jurisdiction over other counties.[31] It may, in providing for local prohibition of retail liquor selling, leave the word "retail" to judicial definition, and the amount of the penalty to judicial discretion.[32] A statute of a state which, as construed by its courts, provides that a person called as a juror in the trial of a criminal cause is not to be disqualified because he has formed an opinion or impression based upon rumor or newspaper statements, if he shall upon oath state that his verdict will be based only on the evidence at the trial, does not deprive the prisoner tried by such jurors of his life, liberty, or property without due process of law.[33] And in a criminal trial, upon proof of non-residence, permanent absence, and inability to procure the attendance of a witness, the state may put in evidence the deposition of such witness, taken upon the preliminary examination before a committing magistrate when defendants were present and their counsel was afforded opportunity to cross-examine.[34] The Amendment does not interfere with a state's regulation of the remedies afforded to creditors of its municipalities for the collection of their debts.[35] But due process of law is denied by a statutory requirement that a master's deed be taken out by the purchaser at a foreclosure sale within a specified time, where failure to comply with such requirement is held by the highest state court to destroy

[31] Missouri *v.* Lewis, 101 U. S. 22; Duncan *v.* Missouri, 152 *id.* 377; Moore *v.* Missouri, 159 *id.* 673.

[32] Ohio *v.* Dollison, 194 U. S. 445.

[33] Spies *v.* Illinois, 123 U. S. 131.

[34] West *v.* Louisiana, 194 U. S. 258.

[35] Commissioners of Tippecanoe *v.* Lucas, 93 U. S. 108; Louisiana *v.* New Orleans, 109 *id.* 285.

the rights of the mortgagee in possession after condition broken, and to entitle the mortgagor, without payment of his debt, to recover possession in ejectment.[36]

The Amendment being directed against state legislation and not against a judicial misconstruction of such legislation by the courts of the state, when a state legislature has enacted laws for the government of its courts, which, if followed, will furnish all parties with the needed protection to life, liberty, and property, it has performed its constitutional duty, and if one of its courts, acting within its jurisdiction, make an erroneous decision, the state cannot be deemed guilty of violating the Amendment; thus, where a state statute required of all guardians the giving a bond before selling their wards' real estate, the fact that a court permitted a sale to be made without requiring the giving of such a bond is not a violation of the Amendment;[37] nor is due process of law denied where the court permits an irregularity in the polling of the jury in a criminal trial, the irregularity working no injury to the defendant;[38] nor is due process of law denied where the court refuses a jury trial in civil proceedings, even though such mode of trial be required by statute;[39] nor do mere errors in the administration of a statute afford constitutional grounds for the reversal of a judgment.[40] On the same principle, the constitutional requirement is not violated when an accused person is tried and sentenced to imprisonment by a judge *de facto* of a court *de jure*.[41]

[36] Bradley *v.* Lightcap, 195 U. S. 1.

[37] Arrowsmith *v.* Harmoning, 118 U. S. 194.

[38] Cross *v.* North Carolina, 132 U. S. 131.

[39] I. C. Ry. *v.* Iowa, 160 U. S. 389.

[40] Lent *v.* Tillson, 140 U. S. 316; B. T. Co. *v.* B. B. R., 151 *id.* 137. See also Marrow *v.* Brinkley, 129 *id.* 178; *In re* Converse, 137 *id.* 624; C. L. Co. *v.* Laidley, 159 *id.* 103; Hooker *v.* Los Angeles, 188 *id.* 314; Arbuckle *v.* Blackburn, 191 *id.* 405.

[41] *In re* Manning, 139 U. S. 504.

But the phrase "due process of law" does not necessarily mean a judicial proceeding. The nation from whom we inherit that phrase has never relied upon the courts of justice for the collection of her taxes, though she passed through a successful revolution in resistance to unlawful taxation.[42] Due process of law is secured in the procedure for the collection of assessments and taxes,[43] and in the exercise of the right of eminent domain,[44] if provision be made for a mode of confirming and contesting the charge thus imposed, with such notice to the person, or such proceedings in regard to the property, as is appropriate to the nature of the case.[45] It has also been

[42] Palmer *v.* McMahon, 133 U. S. 660.

[43] McMillen *v.* Anderson, 95 U. S. 37; Davidson *v.* New Orleans, 96 *id.* 97; Kelly *v.* Pittsburgh, 104 *id.* 78; Hagar *v.* Reclamation District, 111 *id.* 701; Head *v.* A. Mfg. Co., 113 *id.* 9; Wurts *v.* Hoagland, 114 *id.* 606; Kentucky R. Tax Cases, 115 *id.* 321; Spencer *v.* Merchant, 125 *id.* 345; Walston *v.* Nevin, 128 *id.* 578; Lent *v.* Tillson, 140 *id.* 316; Paulsen *v.* Portland, 149 *id.* 30; P., C., C. & St. L. Ry. *v.* Backus, 154 *id.* 421; W. & St. P. L. Co. *v.* Minnesota, 159 *id.* 526; Fallbrook Irr. Dist. *v.* Bradley, 164 *id.* 112; M. & M. Bank *v.* Pennsylvania, 167 *id.* 461; King *v.* Mullins, 171 *id.* 404; B. B. & B. C. R. *v.* New Whatcom, 172 *id.* 314; Weyerhaueser *v.* Minnesota, 176 *id.* 550; French *v.* B. A. P. Co., 181 *id.* 324; Detroit *v.* Parker, *ibid.* 399; Gallup *v.* Schmidt, 183 *id.* 300; King *v.* Portland, 184 *id.* 61; Voigt *v.* Detroit, *ibid.* 115; Goodrich *v.* Detroit, *ibid.* 432; Turpin *v.* Lemon, 187 *id.* 51; Glidden *v.* Harrington, 189 *id.* 255; Hibben *v.* Smith, 191 *id.* 310; Leigh *v.* Green, 193 *id.* 79; *cf.* Carson *v.* Brockton Sewerage Com., 182 *id.* 398; League *v.* Texas, 184 *id.* 156. And a state may provide that a proposed improvement shall not be made if a protest is filed by a majority of resident owners of property liable to assessment therefor, although no such privilege of protest is afforded nonresident owners, where there is no discrimination in assessing for the improvement: Field *v.* B. A. P. Co., 194 U. S. 618.

[44] Pearson *v.* Yewdall, 95 U. S. 294; Huling *v.* K. V. Ry. & Imp. Co., 130 *id.* 559; K. W. P. Co. *v.* G. B. & M. C. Co., 142 *id.* 254; L. I. W. S. Co. *v.* Brooklyn, 166 *id.* 685; Backus *v.* F. S. U. D. Co., 169 *id.* 557; Hooker *v.* Los Angeles, 188 *id.* 314.

[45] It may not tax a franchise granted by another state: L. & J. F. Co. *v.* Kentucky, 188 U. S. 385. The bare observance of legal forms is insufficient where the proceedings are manifestly fraudulent: C., B. & Q. R. *v.* Chicago, 166 U. S. 226; *cf.* Fallbrook Irr. Dist. *v.* Bradley, 164 *id.* 112, 168. And compensation must be made or secured when private property is taken for public use: L. I. W. S. Co. *v.* Brooklyn, 166 *id.* 685; Norwood

held that a state may by statute prohibit the manufacture of liquors;[46] and it may prohibit their sale in saloons to women;[47] it may regulate the hours of labour of persons employed in hazardous occupations;[48] it may prohibit the waste of natural gas and oil;[49] it may fix a reasonable limit upon the rates which may charged by railway,[50] grain elevator,[51] and water supply[52] companies; it may impose special liabilities upon railroad companies;[53] it may require practitioners of medicine to undergo examinations as to their attainments;[54] it may reduce the rate of interest upon judgments previously obtained in its courts,[55] it may provide that an insurer cannot, in an action upon a policy of insurance, deny that the value of

v. Baker, 172 *id.* 269; *cf.* K. W. P. Co. *v.* G. B. & M. C. Co., 142 *id.* 254; Eldridge *v.* Trezevant, 160 *id.* 452; H. Bridge Co. *v.* Henderson City, 173 *id.* 592; A. Ry. *v.* New York, 176 *id.* 335; O. O. Co. *v.* Indiana, 177 *id.* 190; Williams *v.* Parker, 188 *id.* 491. The XIV Amendment, unlike the V Amendment, does not contain an express provision that just compensation shall be rendered.

[46] Mugler *v.* Kansas, 123 U. S. 623; Kidd *v.* Pearson, 128 *id.* 1.

[47] Cronin *v.* Adams, 192 U. S. 108.

[48] Holden *v.* Hardy, 169 U. S. 366. And it may limit the hours of labour on work thereafter contracted for by its municipalities: Atkin *v.* Kansas, 191 U. S. 207.

[49] O. O. Co. *v.* Indiana, 177 U. S. 190.

[50] Dow *v.* Beidelman, 125 U. S. 680; N., C. & St. L. Ry. *v.* Alabama, 128 *id.* 96; C. & G. T. Ry. *v.* Wellman, 143 *id.* 339; St. L. & S. F. Ry. *v.* Gill, 156 *id.* 649; C., M. & St. P. Ry. *v.* Tompkins, 176 *id.* 167; *cf.* C., M. & St. P. Ry. *v.* Minnesota, 134 *id.* 418; M. E. Ry. *v.* Minnesota, *ibid.* 467; Smyth *v.* Ames, 169 *id.* 466; L. S. & M. S. Ry. *v.* Smith, 173 *id.* 684.

[51] Munn *v.* Illinois, 94 U. S. 113; Budd *v.* New York, 143 *id.* 517; Brass *v.* North Dakota, 153 *id.* 391.

[52] S. D. L. & T. Co. *v.* National City, 174 U. S. 739; K. W. Co. *v.* Knoxville, 189 *id.* 434; S. D. L. & T. Co. *v.* Jasper, *ibid.* 439; Stanislaus County *v.* S. J. & K. R. C. & I. Co., 192 *id.* 201. See also Cotting *v.* K. C. S. Y. Co., 183 *id.* 79.

[53] M. P. Ry. *v.* Mackey, 127 U. S. 205; M. & St. L. Ry. *v.* Herrick, *ibid.* 210; St. L. & S. F. Ry. *v.* Mathews, 165 *id.* 1; *cf.* M. & St. L. Ry. *v.* Beckwith, 129 *id.* 26; C., C. & A. R. *v.* Gibbes, 142 *id.* 386; New York *v.* Squire, 145 *id.* 175; M. P. Ry. *v.* Nebraska, 164 *id.* 403; G., C. & S. F. Ry. *v.* Ellis, 165 *id.* 150. See also C., R. I. & P. Ry. *v.* Zernecke, 183 *id.* 582.

[54] Dent *v.* West Virginia, 129 U. S. 114; Reetz *v.* Michigan, 188 *id.* 505.

[55] Morley *v.* L. S. & M. S. Ry., 146 U. S. 162.

the goods destroyed was that set forth in the insurance papers;[56] it may require the redemption in cash of store orders issued by employers in payment of wages due to employees;[57] it may prohibit the manufacture and sale of oleomargarine containing colouring matter;[58] it may prohibit its railway companies from charging greater rates for shorter than for longer hauls, except by permission of the railroad commission;[59] it may require railways to erect and maintain stations on orders of the railroad commission which are not shown to be unreasonable;[60] it may forbid the selling of options for the purchase or sale of commodities;[61] and it may forbid the maintenance of a cow stable within municipal limits without permission from the municipal assembly.[62] It has also been held that a state may by statute make water rates a lien on land prior to the lien of a mortgage of date subsequent to the statute;[63] it may validate a legally defective mortgage;[64] it may require a purchaser of land under a sale for non-payment of taxes to bring his possessory action within five years after the sale;[65] it may shorten the period of limitation of actions, provided it allows a reasonable time for the bringing of actions after the passage of the statute and before the bar takes effect;[66] and it may, without depriving a debtor of his property, repeal a statute of limitations after the debt is thereby barred.[67]

[56] O. I. Co. *v.* Daggs, 172 U. S. 557.
[57] K. I. Co. *v.* Harbison, 183 U. S. 13.
[58] C. C. D. Co. *v.* Ohio, 183 U. S. 238.
[59] L. & N. R. *v.* Kentucky, 183 U. S. 503.
[60] M. & St. L. R. *v.* Minnesota, 193 U. S. 53.
[61] Booth *v.* Illinois, 184 U. S. 425.
[62] Fischer *v.* St. Louis, 194 U. S. 361.
[63] Provident Inst. for Savings *v.* Jersey City, 113 U. S. 506.
[64] Gross *v.* U. S. Mtge. Co., 108 U. S. 477.
[65] Barrett *v.* Holmes, 102 U. S. 651.
[66] Wheeler *v.* Jackson, 137 U. S. 245; Turner *v.* New York, 168 *id.* 90; S. L. & T. Co. *v.* Comptroller of New York, 177 *id.* 318.
[67] Campbell *v.* Holt, 115 U. S. 620.

So also a state may tax remainders created by will before the precedent estates terminate and the remainders vest in possession.[68] So also a state may provide for the inspection of mines, establish a fee for the same, and allow the inspectors to determine the number of inspections per year required by each mine;[69] the date of the execution of a murderer may be fixed by the court in the absence of the convict,[70] or it may be fixed by the governor;[71] if permitted by statute, the governor may remove a subordinate official from office;[72] and a mayor may, by municipal ordinance, be given the power to grant or refuse permission to move buildings upon the public streets of the city.[73] On the same principle, the trial of contested elections may be committed by the state constitution to the legislature of the state and the provision of the XIV Amendment that no person shall be deprived of his propery without due process of law is not thereby violated.[74]

The "full faith and credit" clause.

118. The judicial action of the states is also restrained by Section 1 of Article IV of the Constitution, which de-

[68] Orr *v.* Gilman, 183 U. S. 278.

[69] St. L. C. C. Co. *v.* Illinois, 185 U. S. 203.

[70] Fielden *v.* Illinois, 143 U. S. 452.

[71] Holden *v.* Minnesota, 137 U. S. 483. On the power of executive officers to decide upon a term of imprisonment, see Dreyer *v.* Illinois, 187 U. S. 71.

[72] Wilson *v.* North Carolina, 169 U. S. 586.

[73] Wilson *v.* Eureka City, 173 U. S. 32.

[74] Taylor and Marshall *v.* Beckham, 178 U. S. 548. For decisions as to "liberty," see Allgeyer *v.* Louisiana, 165 *id.* 578; Davis *v.* Massachusetts, 167 *id.* 43; and also G. S. F. H. Co. *v.* Jones, 193 *id.* 532; as to "property," see Pennie *v.* Reis, 132 *id.* 464; Eldridge *v.* Trezevant, 160 *id.* 452; Plessy *v.* Ferguson, 163 *id.* 537; M. P. Ry. *v.* Nebraska, 164 *id.* 403; Sentell *v.* N. O. & C. R., 166 *id.* 698; W. R. *v.* Defiance, 167 *id.* 88. On "due process of law" under the V Amendment, see Sec. 112, *supra.* The XIV Amendment is directed against the states and, therefore, does not protect individuals against actions by officials in violation of state laws: Barney *v.* City of New York, 193 U. S. 430.

clares that, "full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. And the Congress may by general laws prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof."[75] Under this constitutional grant of authority Congress has enacted,[76] that "the acts of the legislature of any state or territory, or of any country subject to the jurisdiction of the United States, shall be authenticated by having the seals of such state, territory, or country affixed thereto. The records and judicial proceedings of the courts of any state or territory, or of any such country, shall be proved or admitted in any other court within the United States by the attestation of the clerk, and the seal of the court annexed, if there be a seal, together with a certificate of the judge, chief justice, or presiding magistrate, that the said attestation is in due form. And the said records and judicial proceedings so authenticated, shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the state from which they are taken." Legislative acts of a state are, under the terms of the Act of 1790, authenticated by the seal of the state, and in the absence of contrary proof, the seal will be presumed to have been affixed by the officer having its custody and duly authorized to affix

[75] "The judgments of a foreign state are *prima facie* evidence only, and but for these constitutional and legislative provisions judgments of a state of the Union, when sued upon in another state, would have no greater effect. . . . Judgments rendered in . . . foreign country, by the laws of which our own judgments are reviewable upon the merits, are not entitled to full credit and conclusive effect when sued upon in this country, but are *prima facie* evidence only of the justice of the plaintiff's claim:" Hilton *v.* Guyot, 159 U. S. 113, 182, 227. But where, by international comity, the courts of another country give full effect to the judgment of an American court, a judgment rendered in that country can be impeached only on the ground of fraud: Ritchie *v.* Mullen, 159 U. S. 235.

[76] Act of 26th May, 1790, 1 Stat. 122; Rev. Stat., sec. 905.

it to the record.[77] Such acts will "be given the same effect by the courts of another state that they have by law and usage" in the state of their enactment;[78] and, as the courts of every state and country have the exclusive power of construing its local statutes, their construction thereof will be followed in the courts of other countries and states.[79] On this line it has been held that if a state court has decided that a law is in harmony with the state constitution its validity, so far as the state constitution is concerned, cannot be questioned elsewhere.[80] Yet even an erroneous construction of a statute by the courts of another state does not deny to it the faith and credit required by the Constitution where the local courts have not considered the statute or where their construction has not been proved as a fact in the foreign state.[81] And a construction by a state court of decrees made by a federal court and by a court of another state will not be held to deny full faith and credit to those decrees unless the unreasonableness of the construction is clearly shown.[82] It is essential to the enforcement in the courts of the states of the legislative acts[83] and records of judicial proceed-

[77] U. S. *v.* Amedy, 11 Wheat. 392.

[78] C. & A. R. *v.* W. F. Co., 119 U. S. 615, 622; *cf.* Friedlander *v.* T. & P. Ry., 130 *id.* 416.

[79] Elmendorf *v.* Taylor, 10 Wheat. 152; Smith *v.* Condry, 1 How. 28; Bucher *v.* C. R., 125 U. S. 555; Cross *v.* Allen, 141 *id.* 528; B. T. Co. *v.* B. B. R., 151 *id.* 137; Laing *v.* Rigney, 160 *id.* 531; Turner *v.* Wilkes County Comrs., 173 *id.* 461; Mitchell *v.* First Nat. Bank, 180 *id.* 471; A. A. P. Co. *v.* D. P. Co., 191 *id.* 373.

[80] Spencer *v.* Merchant, 125 U. S. 345; Fallbrook Irr. Dist. *v.* Bradley, 164 *id.* 112; Forsyth *v.* Hammond, 166 *id.* 506; *In re* Duncan, 139 *id.* 449; Leeper *v.* Texas, *ibid.* 462; Andrews *v.* Swartz, 156 *id.* 272; Miller *v.* C. R., 168 *id.* 131; Brown *v.* New Jersey, 175 *id.* 172; Erb *v.* Morasch, 177 *id.* 584; Wilkes County *v.* Coler, 180 *id.* 506.

[81] Glenn *v.* Garth, 147 U. S. 360; Lloyd *v.* Matthews, 155 *id.* 222; Banholzer *v.* N. Y. L. I. Co., 178 *id.* 402; Johnson *v.* N. Y. L. I. Co., 187 *id.* 491; E. B. & L. Assn. *v.* Williamson, 189 *id.* 122; Finney *v.* Guy, *ibid.* 335. See also E. B. & L. Assn. *v.* Ebaugh, 185 *id.* 114.

[82] C. P. Co. *v.* Beckwith, 188 U. S. 567.

[83] U. S. *v.* Amedy, 11 Wheat. 392.

ings in the courts [84] of another state, that they be certified in strict compliance with the directions of the act of Congress. But a judgment of a state court, though certified in accordance with the act of Congress, does not operate *proprio vigore* in another state, and in order to give it the force of a judgment in that other state, suit must be brought upon it there, and the period of limitation as prescribed by the *lex fori* may be pleaded as against such a judgment.[85] When so certified and sued upon, such judgments must be given the same effect that is given to them in the jurisdiction in which they have been rendered. Therefore, to an action on a judgment so certified, *nil debet* cannot be pleaded; [86] nor, it seems, can fraud be pleaded to an action on such a judgment.[87] When the record of a judgment falsely recites an appearance by counsel, it cannot be collaterally impeached, when sued upon in another state, for it might have been set aside by *audita querela,* in the jurisdiction wherein it was rendered.[88] But no greater effect can be given in a state court to a judgment of a court of another state than would

[84] Caperton *v.* Ballard, 14 Wall. 238; Ferguson *v.* Harwood, 7 Cr. 408; Owings *v.* Hull, 9 Pet. 607, 627.

[85] McElmoyle *v.* Cohen, 13 Pet. 312; Bank of Alabama *v.* Dalton, 9 How. 522; Bacon *v.* Howard, 20 *id.* 22.

[86] Armstrong *v.* Carson, 2 Dall. 302; Mills *v.* Duryee, 7 Cr. 481; Hampton *v.* McConnel, 3 Wheat. 234.

[87] Christmas *v.* Russell, 5 Wall. 290; Maxwell *v.* Stewart, 22 *id.* 77. See, however, dicta in McNitt *v.* Turner, 16 Wall. 352, 366; Cole *v.* Cunningham, 133 U. S. 107, 112; Simmons *v.* Saul, 138 *id.* 439, 454. In Cole *v.* Cunningham, it was held that a court may enjoin a citizen of its own state from prosecuting fraudulent proceedings commenced by him in the courts of another state. In Andrews *v.* Andrews, 188 U. S. 14, a state court properly refused credit to a divorce obtained by fraud in another state.

[88] Landes *v.* Brant, 10 How. 348, 371; *cf.* Knowles *v.* G. & C. Co., 19 Wall. 58; Cooper *v.* Newell, 173 U. S. 555. A judgment conclusive in the state in which it has been rendered is conclusive in the courts of the United States: Caldwell *v.* Carrington, 9 Pet. 86; Christmas *v.* Russell, 5 Wall. 302; Cheever *v.* Wilson, 9 *id.* 108; Pennoyer *v.* Neff, 95 U. S. 714; C. & A. R. *v.* W. F. Co., 108 *id.* 18; Erb *v.* Morasch, 177 *id.* 584.

be given to that judgment in the state where rendered. Therefore, a personal judgment which has been rendered in one state against several parties jointly, service of process having been made on some of them, or they having voluntarily appeared, and service having been made by publication as to the others, is not evidence outside of the state of any liability on the part of those not personally served.[89] Nor will a judgment rendered in one state against two joint debtors, only one of whom has been served with process, support an action in a court of another state against the party not served, nor avail as the foundation of a judgment against him.[90] A judgment recovered in one state against two joint defendants, one of whom has been duly summoned and the other has not, and which is valid and enforcible by the law of that state against the party served with process, will support an action against that party in another state.[91] It is an essential prerequisite to the enforcement in any court of a judgment, either *in personam* or *in rem,* rendered in any court, that the court rendering the judgment had by law jurisdiction of the subject-matter of the suit;[92] and, if the judgment was *in personam,* that the defendant either was served with process within the territorial jurisdiction of the court, or voluntarily appeared in the suit;[93] and, if the judg-

[89] Board of Pub. Works *v.* Columbia College, 17 Wall. 521.

[90] D'Arcy *v.* Ketchum, 11 How. 165.

[91] Hanley *v.* Donoghue, 116 U. S. 1; Renaud *v.* Abbott, *ibid.* 277.

[92] Glass *v.* Sloop Betsey, 3 Dall. 6; Rose *v.* Himely, 4 Cr. 241, 269; Elliott *v.* Peirsol, 1 Pet. 328, 340; Voorhees *v.* Bank of the U. S., 10 *id.* 449, 475; Wilcox *v.* Jackson, 13 *id.* 498, 511; Shriver's Lessee *v.* Lynn, 2 How. 43, 59; Lessee of Hickey *v.* Stewart, 3 *id.* 750, 762; Williamson *v.* Berry, 8 How. 495, 540; Thompson *v.* Whitman, 18 Wall. 457; Maxwell *v.* Stewart, 22 *id.* 77; Cole *v.* Cunningham, 133 U. S. 107; Simmons *v.* Saul, 138 *id.* 439; Thormann *v.* Frame, 176 *id.* 350; Clarke *v.* Clarke, 178 *id.* 186; Andrews *v.* Andrews, 188 *id.* 14; G. S. & L. S. *v.* Dormitzer, 192 *id.* 125.

[93] Mayhew *v.* Thatcher, 6 Wheat. 129; D'Arcy *v.* Ketchum, 11 How. 165; Harris *v.* Hardeman, 14 *id.* 334; L. I. Co. *v.* French, 18 *id.* 404; Bischoff *v.* Wethered, 9 Wall. 812; Board of Public Works *v.* Columbia College,

ment was *in rem,* that the *res* was within the territorial jurisdiction of the court acting upon it, and was properly brought under its control;[94] for process issued by any court, and served personally on a defendant out of its territorial jurisdiction, and process published within that territorial jurisdiction, are equally unavailing in a proceeding to establish a personal liability on the part of the defendant, and while, where property is by seizure or some equivalent act brought within the control of a court, substituted service by publication is sufficient to inform a non-resident owner of the property of the object of the proceeding, such publication is not effectual to ground a personal liability upon.[95] But if a non-resident defendant has by attorney voluntarily appeared in the action, and judgment has been rendered in his favour in the court of the first instance, he may, after the withdrawal of his attorney's appearance, be notified, by publication, of a writ of error or appeal, by means of which the cause is removed to an appellate tribunal, and a judgment of reversal in that tribunal will be binding on him as a judgment *in personam,* and as such enforcible against him in the court of another state.[96] And a judgment *in personam* may be rendered in a proceeding *in rem* against a defendant out of the jurisdiction, who has by his voluntary appearance made himself a party to the litigation, and such a judgment is enforcible by an action thereon in

17 *id.* 521; Pennoyer *v.* Neff, 95 U. S. 714; St. Clair *v.* Cox, 106 *id.* 350; G. & B. S. M. Co. *v.* Radcliffe, 137 *id.* 287; Cooper *v.* Newell, 173 *id.* 555. See also Wedding *v.* Meyler, 192 *id.* 573.

[94] Boswell *v.* Otis, 9 How. 336; Ennis *v.* Smith, 14 *id.* 400, 430; Cooper *v.* Reynolds, 10 Wall. 308; Johnson *v.* Powers, 139 U. S. 156; Reynolds *v.* Stockton, 140 *id.* 254; Carpenter *v.* Strange, 141 *id.* 87; Cooper *v.* Newell, 173 *id.* 555; Howard *v.* De Cordova, 177 *id.* 609; Clarke *v.* Clarke, 178 *id.* 186.

[95] Pennoyer *v.* Neff, 95 U. S. 714; Cooper *v.* Reynolds, 10 Wall. 308; Webster *v.* Reid, 11 How. 437; Phelps *v.* Holker, 1 Dall. 261; Freeman *v.* Alderson, 119 U. S. 185.

[96] Nations *v.* Johnson, 24 How. 195.

another state against that defendant.[97] Yet where the defendant takes no part in the proceedings after responding to the complaint as filed, and on those pleadings a judgment is rendered which is in no way responsive to them, that fact may be set up in bar to a recovery on the judgment.[98] A court may take jurisdiction of an action for divorce brought by a citizen of its own state, upon constructive notice of the action being given to the defendant,[99] but where neither party is domiciled within the state, then, although the defendant has received actual notice, a decree of divorce is not entitled to faith and credit in any other jurisdiction.[100] Where a corporation chartered by one state is permitted by another state to transact business therein upon condition that service of process upon a resident agent of the corporation should be considered as service upon the corporation, a judgment rendered in the latter state against the corporation, and based upon such service of process upon the agent, must be received in the state chartering the corporation with the same faith and credit that is given to it in the state wherein it is rendered.[1] But a judgment *in personam* rendered against a foreign corporation in a suit begun in a state court by an attachment of property, and, as incident thereto, a service of a copy of the writ and an inventory of the attached property on a resident agent, without appearance by the corporation, is not conclusive in another action to which the corporation is a party in a court of the United States.[2] Where a court of one state grants pro-

[97] Maxwell *v.* Stewart, 22 Wall. 77.

[98] Reynolds *v.* Stockton, 140 U. S. 254.

[99] Atherton *v.* Atherton, 181 U. S. 155.

[100] Andrews *v.* Andrews, 188 U. S. 14; Brewer, Shiras, and Peckham, JJ., dissenting. See also G. S. & L. S. *v.* Dormitzer, 192 *id.* 125; Bell *v.* Bell, 181 *id.* 175; Streitwolf *v.* Streitwolf, *ibid.* 179.

[1] L. I. Co. *v.* French, 18 How. 404.

[2] St. Clair *v.* Cox, 106 U. S. 350.

bate of a will disposing of lands in another state, it merely decides that the will was executed in accordance with the laws of the domicile, and a court of the state in which the land is situated does not violate the constitutional provision in deciding that the will was not executed in accordance with its own laws.[3] The record of a judgment rendered in another state may be contradicted as to the facts necessary to give the court jurisdiction, and its recital of the existence of such facts is not conclusive, and want of jurisdiction may be shown either as to the subject-matter or as to the person, and, in proceedings *in rem,* as to the *res.* Therefore, in an action of trespass *de bonis,* etc., in a court of the United States against a county sheriff of New Jersey for taking the plaintiff's oyster boat, the defendant having pleaded in justification the record of a forfeiture of the boat under a New Jersey statute authorizing a summary conviction on a hearing by two justices of the county in which the seizure was made, it was held, that the recital in the record of a seizure of the boat in the county in which the justices exercised jurisdiction was open to contradiction by evidence that the seizure was not made within the territorial limits of that county.[4] On the same principle, a recital in a record of a personal service of a summons upon a defendant, may be contradicted by proof that the defendant was not served;[5] and a recital of appearance by attorney may be contradicted by showing that no attorney was authorized to appear for the defendant in the suit.[6] Administrators in different jurisdictions of the personal estate of the same decedent are not privies in estate to the extent that a judgment in one jurisdiction against one administrator

[3] Blount *v.* Walker, 134 U. S. 607.

[4] Thompson *v.* Whitman, 18 Wall. 457.

[5] Knowles *v.* G. & C. Co., 19 Wall. 58.

[6] Cooper *v.* Newell, 173 U. S. 555.

is enforcible in the other jurisdiction against the administrator therein;[7] and the grant of letters of administration in one state cannot authorize the administrator to maintain any suit in the courts, either state or federal, held in any other state.[8] An objection to the informality of the authentication of a record cannot be made by a party who has antecedently offered that identical record in another proceeding.[9] In a suit for wages the defendant can set up a judgment in garnishment proceedings against the same wages, recovered in another state, and that judgment is a bar to further action.[10] A state statute of limitations, providing that suits upon judgments rendered in other states, if not brought within two years, shall be barred, is a bar to an action on such a judgment against one who only became a citizen of the state on the day on which suit was brought.[11] A judgment recovered on a penal statute of a state cannot be enforced in another jurisdiction;[12] but the rule is otherwise when the judgment has been recovered on a statute affording a private remedy to the person injured.[13] A state may deny to its courts jurisdiction over suits between foreign corporations on a foreign judgment, for "this provision of the Constitution establishes a rule of evidence rather than of jurisdiction."[14] Wherever a state court refuses in a cause to give due effect to a judgment rendered in a court of the United States, or in a court of another state, having by law jurisdiction of the subject-matter of litigation, and having acquired by due service of process, or otherwise,

[7] Stacy *v.* Thrasher, 6 How. 44.

[8] Johnson *v.* Powers, 139 U. S. 156.

[9] Urtetiqui *v.* D'Arbel, 9 Pet. 692.

[10] C., R. I. & P. Ry. *v.* Sturm, 174 U. S. 710.

[11] Bank of the State of Alabama *v.* Dalton, 9 How. 522.

[12] Wisconsin *v.* P. I. Co., 127 U. S. 265.

[13] Huntington *v.* Attrill, 146 U. S. 657; Whitman *v.* Oxford Nat. Bank, 176 *id.* 559; Hancock Nat. Bank *v.* Farnum, *ibid.* 640.

[14] A. A. P. Co. *v.* D. P. Co., 191 U. S. 373.

jurisdiction of the person of the party against whom judgment has been rendered, the action of the state court in so refusing is subject to review in the Supreme Court of the United States under the 25th Section of Judiciary Act of 1789, and the Act of 5th February, 1867.[15] The record of a court of the United States is sufficiently proved when certified by the clerk of the court under its seal.[16] And the judgments of the courts of the United States, when sued upon, or set up by way of defense in state courts, are, if rendered in a cause of which the court of the United States had jurisdiction both as to the subject-matter and the *res* or the person of the defendant, conclusive upon the parties and privies thereto, and enforcible in the state courts to the same extent as in courts of the United States.[17] Judgments rendered in courts of the United States in causes, jurisdiction of which was obtained by reason of the citizenship of the parties, and in which the law of the state within which the court sat was administered, have only that validity and effect which is due to a judgment of a court of the state in such a cause,[18] and, therefore, a court of a state which refuses to give a greater effect to such a judgment of a court of the United States cannot be said to decide against a title or right claimed under an authority exercised under the United States.

[15] 14 Stat. 385. Rev. Stat., Sec. 709.

[16] Turnbull *v.* Payson, 95 U. S. 418.

[17] Embry *v.* Palmer, 107 U. S. 3; Werlein *v.* New Orleans, 177 *id.* 390. See also N. F. & P. W. *v.* O. W. S. Co., 183 *id.* 216; Deposit Bank *v.* Frankfort, 191 *id.* 499.

[18] Dupasseur *v.* Rochereau, 21 Wall. 130.

CHAPTER XI.

RIGHTS OF PERSON AND OF PROPERTY.

119. Citizenship of the United States.
120. Citizenship of a state.
121. The right of suffrage.
122. The right of serving on juries.
123. Congressional regulation of federal elections.
124. Immigrants and aliens.
125. Personal and property rights.
126. The rights within a state of citizens of other states.
127. Foreign corporations.
128. The I Amendment.
129. The XIII Amendment.
130. The XIV Amendment.
131. The equal protection of the laws.
132. The police power.

Citizenship of the United States.

119. As Miller, J., stated in the judgment in the Slaughter House Cases,[1] the Constitution, as originally adopted, did not define citizenship of the United States, although it did, by Section 2 of Article IV, provide that "the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states," and, by Section 2 of Article I, declare citizenship of the United States to be a necessary qualification for election as a representative in Congress. In view of that which the Constitution said, and of that which it left unsaid, it might well have been thought that citizenship of the United States was dependent upon and only incident to citizenship of a state, but the point was not judicially determined before the adoption of the XIV Amendment. In a recent

[1] 16 Wall. 72.

case,[2] however, Gray, J., discussed at length the meaning of the term "citizen" as used at common law and suggested that after the adoption of the Constitution all white persons, at least, born within the sovereignty of the United States, whether children of citizens or of foreigners, excepting only children of ambassadors or public ministers of a foreign government, were native-born citizens of the United States. An even broader definition of the term was established by Section 1 of the XIV Amendment, which declares that "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside." From and after the adoption of that Amendment, therefore, the birth within the United States of any person, whether white or coloured, who is subject to its jurisdiction, or the naturalization of any alien, makes the person so born, or naturalized, a citizen of the United States;[3] and that right of citizenship is entitled to protection under such laws as Congress may enact in execution of the powers conferred by the XIV and XV Amendments. Section 8 of Article I of the Constitution authorizes Congress "to establish an uniform rule of naturalization." It is, therefore, beyond the power of any state to prescribe the conditions of naturalization, or to admit to citizenship any alien other than those whom the acts of Congress permit to be naturalized;[4] nevertheless aliens may be naturalized by proceedings in courts of the states in conformity with the acts of Congress.[5]

[2] U. S. *v.* Wong Kim Ark, 169 U. S. 649.

[3] The Slaughter House Cases, 16 Wall. 73; U. S. *v.* Cruikshank, 92 U. S. 548; U. S. *v.* Wong Kim Ark, 169 *id.* 649, *cf.* Elk *v.* Wilkins, 112 *id.* 94. Congress may, by statute or treaty, provide for the collective naturalization of the citizens of a territory upon its admission to statehood: Boyd *v.* Nebraska, 143 U. S. 135; Contzen *v.* U. S., 179 *id.* 191.

[4] Chirac *v.* Chirac, 2 Wheat. 269; Dred Scott *v.* Sandford, 19 How. 405.

[5] Collet *v.* Collet, 2 Dall. 294.

Citizenship of a state.

120. In Dred Scott *v.* Sandford,[6] the court determined that a free negro could not be a citizen of a state, but, in his dissenting judgment, Curtis, J., showed that it was an historical fact, that in five of the thirteen original states negroes were not only recognized as citizens, but also admitted to the exercise of the right of suffrage, and that many acts of Congress had, by necessary implication, recognized negroes as citizens; and the weight of authority supports the position, that each state could, so far as the Constitution of the United States does not restrain it, determine the *status,* and consequently the citizenship, of the persons domiciled within its territory.[7] By the terms of the XIV Amendment, "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside." Therefore birth, or naturalization, in the United States, followed by residence within the territory of any state, makes the person so born or naturalized, and so residing, a citizen of that state.

The right of suffrage.

121. All citizens are not necessarily entitled to the exercise of the right of suffrage, for the term "citizen," in the constitutional sense of the term, means one who owes the duty of allegiance and is entitled to the correlative right of protection, and it, therefore, includes persons who, by reason of sex, or age, may not be qualified to vote. The right of suffrage is a subject of state regulation, and not a privilege, or immunity, of citizenship protected by the Constitution of the United States,[8] except in so far

[6] 19 How. 393.

[7] Strader *v.* Graham, 10 How. 93; Holmes *v.* Jennison, 14 Pet. 540; Groves *v.* Slaughter, 15 *id.* 449; Prigg *v.* Pennsylvania, 16 *id.* 539.

[8] Pope *v.* Williams, 193 U. S. 621.

as the XIV Amendment protects it. The Constitution provides, in Section 2 of Article I, that, at congressional elections, "the electors in each state shall have the qualifications requisite for electors of the most numerous branch of the state legislature."[9] A state may, without contravening any constitutional provision, deny the suffrage to women,[10] but by force of the XV Amendment a state may not, in its limitations on the exercise of the right of suffrage, discriminate against citizens of the United States on account of their "race, colour, or previous condition of servitude." A state, therefore, cannot limit the right of suffrage to the white race.[11] Nevertheless, the power of Congress to legislate for the protection of the rights conferred by that Amendment being limited by the terms of the Amendment, Congress cannot by statute provide for the punishment of state election officers for wrongfully refusing to receive the vote of a qualified voter at an election, when that refusal is not based upon a discrimination against the voter on account of his race, colour, or previous condition of servitude;[12] nor can Congress by a general statute provide for the punishment of individuals who bribe persons to whom the right of suffrage is guaranteed by that Amendment;[13] nor can a conviction in a court of the United States be sustained under an indictment which charges the defendant in general terms with an intent to hinder and prevent citizens of the United States, of African descent, therein named, in the free exercise and enjoyment of the rights, privileges, immunities, and protection, granted and secured to them

[9] Wiley *v.* Sinkler, 179 U. S. 58. See also Mason *v.* Missouri, *ibid.* 328; Swafford *v.* Templeton, 185 *id.* 487.

[10] Minor *v.* Happersett, 21 Wall. 162.

[11] *Ex parte* Yarbrough, 110 U. S. 665. See Giles *v.* Harris, 189 *id.* 475; Giles *v.* Teasley, 193 *id.* 146.

[12] U. S. *v.* Reese, 92 U. S. 214.

[13] James *v.* Bowman, 190 U. S. 127.

as citizens of the United States and of a state, without specifying any particular right, the enjoyment of which the conspirators intended to hinder or prevent.[14]

As the right of a citizen of a state to vote for representatives in Congress is derived not only from the constitution and laws of his state, but also from the Constitution and laws of the United States, it follows that a citizen, otherwise qualified under the constitution and laws of his state, may maintain an action at law in the circuit court of the United States to recover from officers of the state damages for their wrongful refusal of his vote at a congressional election.[14a] But where the constitution of a state defines the qualifications for the exercise of the suffrage, and imposes the conditions of registry as a voter, one to whom registry is refused cannot, upon an allegation that the state's system of registration is void because it violates the XV Amendment, maintain a suit in equity in the circuit court of the United States to compel the state officers to register him as a voter under that system which he alleges to be void, for a decree in his favour would accomplish no practical result;[14b] and when that citizen has brought an action at law in a court of the state to recover from state officers damages for their alleged wrongful refusal to register him as a voter, and when he has petitioned a court of the state for a *mandamus* to compel the state officers to register him as a voter, and the state court of last resort has entered judgment against him on the grounds that if the provisions of the state constitution are repugnant to the XV Amendment they are void and registrars appointed thereunder had no power to act, they could not be liable to him in

[14] U. S. *v.* Cruikshank, 92 U. S. 542.

[14] *a* Wiley *v.* Sinkler, 179 U. S. 58; Swafford *v.* Templeton, 185 *id.* 487.

[14] *b* Giles *v.* Harris, 189 U. S. 475; Harlan, Brewer, and Brown, JJ., dissented.

damages for their refusal to register him, and they cannot be compelled by *mandamus* to register him; and the Supreme Court of the United States cannot reverse the judgment of the state court upon writ of error, for the state court has denied relief to the plaintiff in error for reasons independent of the federal right upon which he claimed.[14c]

The right of serving on juries.

122. The right of serving as a juror being incident to citizenship, a state cannot so regulate the selection of jurors in its courts as to prevent citizens of African descent from serving as jurors.[15]

Congressional regulation of federal elections.

123. Section 4 of Article I of the Constitution declares that, "the times, places and manner of holding elections for senators and representatives, shall be prescribed in each state by the legislature thereof; but the Congress may at any time by law make or alter such regulations, except as to the places of choosing senators." Under this clause of the Constitution, Congress without question provided for the election of its members by separate districts, composed of contiguous territory, and required the election in every district throughout the United States to be held on the Tuesday after the first Monday of November in every second year. In other respects, however, the exercise of power by Congress on this subject has been contested in the courts. In the several cases it has been held, that Congress, having a supervisory control over the election of its members, and

[14] *c.* Giles *v.* Teasley, 193 U. S. 146.

[15] XV Amendment; Strauder *v.* West Virginia, 100 U. S. 303; Virginia *v.* Rives, *ibid.* 313; *Ex parte* Virginia, *ibid.* 339; Neal *v.* Delaware, 103 *id.* 370; Gibson *v.* Mississippi, 162 *id.* 565; Carter *v.* Texas, 177 *id.* 442; Rogers *v.* Alabama, 192 *id.* 226.

being authorized to make regulations of its own, or to alter regulations made by any state, can by statute impose duties on state officers of election, punish the non-performance by such officers of their duties, whether imposed by laws of the state or by acts of Congress, and provide for the appointment of officers of the United States to execute the regulations as made by Congress or by the states.[16] It has also been held that Congress can, for the protection of the voters at congressional elections, punish acts of violence or intimidation done in furtherance of a conspiracy to prevent a voter from exercising the franchise at such elections;[17] and it can punish interference with election officers when engaged in the discharge of their official duties.[18]

The appointment and mode of appointment of electors belong exclusively to the states. Congress is empowered to determine the time of choosing electors and the day on which they shall give their votes, which must be the same day throughout the United States, but otherwise the power and jurisdiction of the state is exclusive, with the exception of the provisions as to the number of electors and the ineligibility of certain persons, so framed as to exclude federal influence.[19]

Immigrants and aliens.

124. The states cannot,[20] and the United States can,[21] control and regulate immigration and the residence of aliens in the United States. This power is an incident of sovereignty which cannot be alienated in the exercise of

[16] *Ex parte* Siebold, 100 U. S. 371; *Ex parte* Clarke, *ibid.* 399; *In re* Coy, 127 *id.* 731.

[17] *Ex parte* Yarbrough, 110 U. S. 651.

[18] Connors *v.* U. S., 158 U. S. 408.

[19] McPherson *v.* Blacker, 146 U. S. 1; *In re* Green, 134 *id.* 377.

[20] Chy Lung *v.* Freeman, 92 U. S. 275, 280.

[21] The Chinese Exclusion Case, 130 U. S. 581.

the treaty-making power.[22] Congress may, therefore, prohibit the immigration of any class of persons; it may expel, and compel the deportation of, resident aliens; and [23] it may forbid the transit of aliens across the territory of the United States.[24] Congress may authorize the courts to investigate and ascertain the facts on which depends the right to land or to remain in the country; [25] or it may entrust to administrative officers the final determination of these facts; [26] and the decisions of such officers will constitute due process of law,[27] and will be binding on the courts. Congress may authorize a United States commissioner to determine the facts upon which citizenship depends.[28] While Congress may, as a means to give effect to the legislation excluding or expelling aliens, authorize their detention in temporary confinement, Congress nevertheless cannot, unless provision be made for a judicial trial, declare an unlawful residence in the country to be an infamous crime punishable by imprisonment at hard labour.[29] An administrative officer when executing a statute affecting the liberty of persons may not disregard the fundamental requirement of due process of law. There must, therefore, be adequate notice to, and a hearing of, the person affected; [30] but defects in the form of the proceeding will not affect its validity, or the finality of its conclusion.[31] The existing legislation is applicable only to persons owing allegiance to a foreign government, and,

[22] The Chinese Exclusion Case, *supra.*

[23] Fong Yue Ting *v.* U. S., 149 U. S. 698.

[24] Fok Yung Yo *v.* U. S., 185 U. S. 296.

[25] U. S. *v.* Jung Ah Lung, 124 U. S. 621.

[26] U. S. *v.* Sing Tuck, 194 U. S. 161; Li Sing *v.* U. S., 180 *id.* 486.

[27] Nishimura Ekiu *v.* U. S., 142 U. S. 651, 660.

[28] U. S. *v.* Wong Kim Ark, 169 U. S. 649; Chin Bak Kan *v.* U. S., 186 *id.* 193.

[29] Wong Wing *v.* U. S., 163 U. S. 228.

[30] The Japanese Immigrant Case, 189 U. S. 86.

[31] Fong Yue Ting, 149 U. S. 698, 729; Chin Bak Kan *v.* U. S., 186 *id.* 193.

therefore, does not affect citizens of Porto Rico;[32] nor does it affect a child born in the United States of parents who, while remaining aliens, have a permanent domicile and residence in the United States.[33]

Personal and property rights.

125. The states retain full control over the personal and property rights of their citizens and of residents within their territory, subject to the restraints imposed by the Constitution.[34] The states retain the power of regulating the tenure of real property within their respective limits, including the mode of its acquisition and transfer, the rules of its descent, and the extent to which a testamentary disposition may be made of such land by its owner, and a state may forbid the United States, by reason of its not being a corporation created by the laws of that state, to take by devise lands within the state.[35] The states may legislate specially for the sale or investment of the estates

[32] Gonzales *v.* Williams, 192 U. S. 1.

[33] U. S. *v.* Wong Kim Ark, 169 U. S. 649.

[34] The first eight Amendments bind only the federal government: Spies *v.* Illinois, 123 U. S. 131, 166; Eilenbecker *v.* Plymouth County, 134 *id.* 31; *In re* Kemmler, 136 *id.* 436; McElvaine *v.* Brush, 142 *id.* 155; Thorington *v.* Montgomery, 147 *id.* 490; Moore *v.* Missouri, 159 *id.* 673; Brown *v.* New Jersey, 175 *id.* 172; C. C. D. Co. *v.* Ohio, 183 *id.* 238; Ohio *v.* Dollison, 194 *id.* 445. The provision of the XIV Amendment that "no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States" protects, it seems, only those rights which are secured against state encroachment by other clauses of the Constitution. See *In re* Kemmler, 136 U. S. 436, 448; Giozza *v.* Tiernan, 148 *id.* 657, 661; Duncan *v.* Missouri, 152 *id.* 377, 382; Maxwell *v.* Dow, 176 *id.* 581; Slaughter House Cases, 16 Wall. 36, 79; Bartemeyer *v.* Iowa, 18 *id.* 129; Presser *v.* Illinois, 116 U. S. 252; Mugler *v.* Kansas, 123 *id.* 623; *In re* Lockwood, 154 *id.* 116; Gray *v.* Connecticut, 159 *id.* 74; Plessy *v.* Ferguson, 163 *id.* 537; Holden *v.* Hardy, 169 *id.* 366; Cumming *v.* Board of Education, 175 *id.* 528; W. P. S. C. *v.* Casperson, 193 *id.* 189; Ohio *v.* Dollison, 194 *id.* 445. The Amendment does not extend to state legislation the restrictions which the first eight Amendments impose upon congressional action: Maxwell *v.* Dow, 176 U. S. 581, 597. Harlan, J., dissented.

[35] U. S. *v.* Fox, 94 U. S. 315.

of infants and other persons not *sui juris*.[36] The shores of navigable waters, and the soil under those waters, were not granted by the Constitution to the United States, but were reserved to the riparian states respectively, and new states have the same rights, sovereignty, and jurisdiction over this subject as the original states.[37] The United States having no proprietary title to lands on the shore of a state, under navigable waters and below high-water mark, can grant no valid title thereto.[38] A state may, therefore, prohibit, or license under regulation, the taking of oysters and fish in the navigable waters within its limits.[39] The states may determine what classes of persons shall come and remain within their territory,[40] provided, of course, that they do not thereby impair the rights of intercourse and traffic secured by the Constitutions to citizens of other states, nor come into conflict with the regulations made by the United States as to immigration and the residence of aliens.[41] The Constitution makes no provision for the protection of the citizens of the several states in their religious liberty, and imposes no restraints on the states in that respect. Therefore, a judgment of a state court imposing a fine upon a clergyman for violation of a municipal ordinance regulating the place and manner of conducting funeral services, is not subject to review in the Supreme Court of the United States.[42]

[36] Hoyt *v.* Sprague, 103 U. S. 613.

[37] Pollard *v.* Hagan, 3 How. 212; Weber *v.* Harbour Commissioners, 18 Wall. 57; Shively *v.* Bowlby, 152 U. S. 1; M. T. Co. *v.* Mobile, 187 *id.* 479.

[38] Pollard *v.* Hagan, 3 How. 212; Goodtitle *v.* Kibbe, 9 *id.* 471; Doe *v.* Beebe, 13 *id.* 25; U. S. *v.* M. R. Co., 189 U. S. 391.

[39] Smith *v.* Maryland, 18 How. 71; McCready *v.* Virginia, 94 U. S. 391.

[40] Holmes *v.* Jennison, 14 Pet. 540; Groves *v.* Slaughter, 15 *id.* 449; Prigg *v.* Pennsylvania, 16 *id.* 539.

[41] *Supra,* Sec. 124.

[42] Permoli *v.* First Municipality, 3 How. 589.

The rights within a state of citizens of other states.

126. Section 2 of Article IV of the Constitution declares that "the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states." As Miller, J., said, in the Slaughter House Cases,[43] the "sole purpose" of this constitutional provision "was to declare to the several states, that whatever those rights, as you grant or establish them to your own citizens, or as you limit, or qualify, or impose restrictions on their exercise, the same, neither more nor less, shall be the measure of the rights of citizens of other states within your jurisdiction."[44] Washington, J., said, in Corfield *v.* Coryell,[45] the privileges and immunities in question are those "which are fundamental, which belong of right to all citizens of all free governments, and which have at all times been enjoyed by citizens of the several states which compose this Union, from the time of their becoming free, independent, and sovereign," including "protection by the government, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety, subject, nevertheless, to such restraints as the government may prescribe for the general good of the whole." In Paul *v.* Virginia,[46] Field, J., said, "The privileges and immunities secured to citizens of each state in the several states . . . are those privileges and immunities which are common to the citizens in the latter states under their constitutions and laws by virtue of their being citizens. Special privileges enjoyed by citizens in their own states are not secured in other states by this provision. It was not intended by the provision to give

[43] 16 Wall. 77.

[44] See, on the same line, Kimmish *v.* Ball, 129 U. S. 217, 222. Compare T. I. Co. *v.* Connecticut, 185 *id.* 364.

[45] 4 Wash. C. C. 371.

[46] 8 Wall. 180.

to the laws of one state any operation in other states. They can have no such operation, except by the permission, express or implied, of those states. The special privileges which they confer must, therefore, be enjoyed at home, unless the assent of other states to their enjoyment therein be given." It is clear that this provision guarantees the privileges and immunities of citizens of other states, and has no reference to action by a state in respect to its own citizens.[47] "The Constitution of the United States does not make the privileges and immunities enjoyed by the citizens of one state under the constitution and laws of that state the measure of the privileges and immunities to be enjoyed, as of right, by a citizen of another state under its constitution and laws."[48] Nor does this constitutional provision vest the citizens of one state with any interest in the common property of citizens of another state. Therefore, a statute of a state by which other than its own citizens are prohibited from planting or taking oysters from the soil which is covered by the tide-waters of that state, is not a violation of any privilege or immunity of citizens, for, subject to the paramount right of navigation, the regulation of which in relation to foreign and interstate commerce has been granted to Congress by the Constitution, each state owns the soil of all tide-waters within its jurisdiction, and may appropriate them to be used by its citizens in common for cultivating and taking fish, etc., if navigation be not thereby obstructed.[49] Nor does this constitutional provision require a state to confer upon citizens of other states peculiar privileges granted to its own citizens; thus, the privilege of community of *acquets* or gains as between married

[47] Bradwell *v.* State, 16 Wall. 130.

[48] Harlan, J., in McKane *v.* Durston, 153 U. S. 684, 687.

[49] McCready *v.* Virginia, 94 U. S. 391. See also Geer *v.* Connecticut, 161 *id.* 519.

persons in Louisiana, as regards lands in Louisiana acquired by a citizen of Mississippi who, while living in that state, has married a woman born in Louisiana, cannot be claimed as a constitutional right, for the wife by her marriage became a citizen of Mississippi.[50] On the same principle, a state may enact a statute of limitations, discriminating, as regards suits against non-resident defendants, against creditors, if citizens of other states, and in favour of creditors who are citizens of the state.[51] On the other hand, a state cannot, without contravening this constitutional provision, so discriminate by taxation against either the natural products of, or the goods manufactured in, another state, as to hinder the citizens of that other state in their exercise of the rights of freely transporting and selling their goods manufactured or unmanufactured.[52] Nor can a state by taxation, or otherwise, restrict

[50] Conner *v.* Elliott, 18 How. 593; Curtis, J., said, "We do not deem it needful to attempt to define the word 'privileges' in the clause of the Constitution. It is safer and more in accordance with the duty of a judicial tribunal, to leave its meaning to be determined in each case, upon a view of the particular rights asserted and denied therein, and especially is this true, when we are dealing with so broad a provision, involving matters not only of great delicacy and importance, but which are of such a character that any merely abstract definition could scarcely be correct; and a failure to make it so would certainly produce mischief." In McCready *v.* Virginia, 94 U. S. 395, Waite, C. J., after referring to the view thus expressed by Curtis, J., added, "this clearly is the safer course to pursue." These dicta, of course, mean only that in the decision of a cause, the court ought to confine themselves to the case at bar and ought not so to generalize as to prejudice cases that have not yet arisen for determination, but they do not mean that the court, in order to arrive at a decision, should reason empirically, and should avoid a clear statement of the general principles whose application must necessarily determine the particular case. If they did mean that, they would establish a "rule" which is not "salutary," and they would lay down a "course" which is not the "safer" one to pursue.

[51] Chemung Canal Bank *v.* Lowery, 93 U. S. 72. Strong, J., dissented.

[52] Ward *v.* Maryland, 12 Wall. 418; Welton *v.* Missouri, 91 U. S. 275; Guy *v.* Baltimore, 100 *id.* 434; Webber *v.* Virginia, 103 *id.* 344; Walling *v.* Michigan, 116 *id.* 446; Robbins *v.* Shelby County, 120 *id.* 489; Corson *v.* Maryland, *ibid.* 502; Asher *v.* Texas, 128 *id.* 129. But see Hinson *v.* Lott, 8 Wall. 148; Downham *v.* Alexandria Council, 10 *id.* 173; Machine Co. *v.*

the exercise by the citizens of other states of their right of free transit from place to place within the United States, in order to approach the seat of government of the United States and the federal offices in the various states.[53] Nor can a state by statute provide that in the distribution of the assets of insolvent debtors local creditors shall be given priority over creditors who are citizens of other states.[54]

Foreign corporations.

127. Foreign corporations are, in the states of the United States, corporations created by any other state, or by a foreign government. A joint stock partnership organized under the laws of a foreign country, with a statutory recognition of the distinctive entity of the association and with powers of transfer of shares and succession of members, and the right to sue and be sued as an aggregation, is regarded in the United States as a foreign corporation.[55] A corporation is not, in its corporate capacity, a citizen, within the meaning of the Constitution;[56] but for jurisdictional purposes there is a conclusive presumption of law that it is composed of citizens of the state which created it, and it may sue and be sued in its corporate name.[57] A foreign corporation is not a citizen

Gage, 100 U. S. 676; Tiernan *v.* Rinker, 102 *id.* 123; Ficklen *v.* Shelby County, 145 *id.* 1; Emert *v.* Missouri, 156 *id.* 296; Rash *v.* Farley, 159 *id.* 263.

[53] Crandall *v.* Nevada, 6 Wall. 35.

[54] Blake *v.* McClung, 172 U. S. 239, 176 *id.* 59; Sully *v.* American Nat. Bank, 178 *id.* 289.

[55] L. I. Co. *v.* Massachusetts, 10 Wall. 566.

[56] The Bank of U. S. *v.* Deveaux, 5 Cr. 61; Paul *v.* Virginia, 8 Wall. 168; Blake *v.* McClung, 172 U. S. 239; O. I. Co. *v.* Daggs, *ibid.* 557.

[57] L., C. & C. R. *v.* Letson, 2 How. 497; Marshall *v.* B. & O. R., 16 *id.* 314; C. D. Co. *v.* Shepherd, 20 *id.* 227; O. & M. R. *v.* Wheeler, 1 Bl. 286; Express Co. *v.* Kountze Bros., 8 Wall. 342; Ry. Co. *v.* Whitton, 13 *id.* 270; St. L. & S. F. Ry. *v.* James, 161 U. S. 545; St. J. & G. I. R. *v.* Steele, 167 *id.* 659; Blake *v.* McClung, 172 *id.* 239; L., N. A. & C. Ry. *v.* L. T. Co., 174 *id.* 552; S. Ry. *v.* Allison, 190 *id.* 326.

within the meaning of Section 2 of Article IV of the Constitution, which declares that "the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states."[58] While corporations are persons within the meaning of the XIV Amendment,[59] they are not entitled to such equal protection of the laws as to have the right to do business within a state, other than that of their incorporation, without being hampered by such discriminating conditions as the state may choose to impose.[60] A corporation exists only in contemplation of law and by force of law, and it can have no legal existence beyond the bounds of the sovereignty creating it, unless it be, by comity, permitted to exist within the bounds of some other sovereignty,[61] save only that a state may not exclude from its limits a corporation which is in the employ of the federal government,[62] or which is engaged in interstate or foreign com-

[58] Paul *v.* Virginia, 8 Wall. 168; P. M. Co. *v.* Pennsylvania, 125 U. S. 181; N. & W. R. *v.* Pennsylvania, 136 *id.* 114; Blake *v.* McClung, 172 *id.* 239; Sully *v.* American Nat. Bank, 178 *id.* 289.

[59] Santa Clara County *v.* S. P. R., 118 U. S. 394; C., C. & A. R. *v.* Gibbes, 142 *id.* 386; C. & L. T. Co. *v.* Sandford, 164 *id.* 578; G., C. & S. F. Ry. *v.* Ellis, 165 *id.* 150; Smyth *v.* Ames, 169 *id.* 466; L. S. & M. S. Ry. *v.* Smith, 173 *id.* 684; P. M. Co. *v.* Pennsylvania, 125 *id.* 181; M. P. Ry. *v.* Mackey, 127 *id.* 205; M. & S. L. Ry. *v.* Herrick, *ibid.* 210; M. & S. L. Ry. *v.* Beckwith, 129 *id.* 26, 28.

[60] P. F. Assn. *v.* New York, 119 U. S. 110; P. M. Co. *v.* Pennsylvania, 125 *id.* 181; O. I. Co. *v.* Daggs, 172 *id.* 557; W.-P. O. Co. *v.* Texas, 177 *id.* 28; Sully *v.* American Nat. Bank, 178 *id.* 289; *cf.* N. Y., L. E. & W. R. *v.* Pennsylvania, 153 *id.* 628; Nutting *v.* Massachusetts, 183 *id.* 553.

[61] Bank of Augusta *v.* Earle, 13 Pet. 519; Runyan *v.* Coster, 14 *id.* 122; O. & M. R. *v.* Wheeler, 1 Bl. 286; P. M. Co. *v.* Pennsylvania, 125 U. S. 181; H. S. M. Co. *v.* New York, 143 *id.* 305; Ashley *v.* Ryan, 153 *id.* 436; Hooper *v.* California, 155 *id.* 648; New York *v.* Roberts, 171 *id.* 658; N. Y. L. I. Co. *v.* Cravens, 178 *id.* 389; Nutting *v.* Massachusetts, 183 *id.* 553. See also D. C. & I. Co. *v.* Barton, *ibid.* 23; D. G. Co. *v.* U. S. G. Co., 187 *id.* 611.

[62] P. M. Co. *v.* Pennsylvania, 125 U. S. 181; H. S. M. Co. *v.* New York, 143 *id.* 305.

merce.[63] Of course, if there be no prohibitory legislation, it is not competent for an individual citizen, not personally interested in the corporation, to object to the doing of business within a state by a foreign corporation.[64] Unless the local law prohibit, a foreign corporation, if its charter so authorizes, may sue and be sued in the courts of a state,[65] make contracts,[66] acquire and hold real estate,[67] buy and sell bills of exchange,[68] and negotiate and issue policies of life and fire insurance.[69] Corporations, by doing business within the bounds of a sovereignty other than that which has created them, do not become corporations of that other sovereignty, nor lose privileges which are incident to their citizenship in the sovereignty which created them. Therefore, a railway corporation of Maryland does not, by becoming lessee of a railway in Virginia, forfeit its right to remove into the Circuit Court of the United States a suit brought against it in the courts of Virginia by a citizen of that state.[70] A state

[63] P. M. Co. *v.* Pennsylvania, 125 U. S. 181; McCall *v.* California, 136 *id.* 104; N. & W. R. *v.* Pennsylvania, *ibid.* 114; Crutcher *v.* Kentucky, 141 *id.* 47; H. S. M. Co. *v.* New York, 143 *id.* 305; Ashley *v.* Ryan, 153 *id.* 436; P. T. C. Co. *v.* Adams, 155 *id.* 688; *cf.* California *v.* C. P. R., 127 *id.* 1; Maine *v.* G. T. Ry., 142 *id.* 217.

[64] Waite, C. J., said in P. T. Co. *v.* W. U. T. Co., 96 U. S. 1, 13, "No citizen of a state can enjoin a foreign corporation from pursuing its business. Until the state acts in its sovereign capacity, individual citizens cannot complain. The state must determine for itself when the public good requires that its implied assent to the admission shall be withdrawn."

[65] Bank of Augusta *v.* Earle, 13 Pet. 519, 587; Cowles *v.* Mercer County, 7 Wall. 118.

[66] Bank of Augusta *v.* Earle, 13 Pet. 519, 591; Runyan *v.* Coster, 14 *id.* 122, 129.

[67] Runyan *v.* Coster, 14 Pet. 122; S. F. et A. des E. U. *v.* Milliken, 135 U. S. 304.

[68] Bank of Augusta *v.* Earle, 13 Pet. 519.

[69] Paul *v.* Virginia, 8 Wall. 168; Ducat *v.* Chicago, 10 *id.* 410; L. I. Co. *v.* Massachusetts, *ibid.* 566; P. F. A. *v.* New York, 119 U. S. 110.

[70] Railroad Co. *v.* Koontz, 104 U. S. 5. See also St. L. & S. F. Ry. *v.* James, 161 *id.* 545; L., N. A. & C. Ry. *v.* L. T. Co., 174 *id.* 552; S. Ry. *v.* Allison, 190 *id.* 326.

may discriminate in favour of its own corporations and against foreign corporations;[71] it may tax foreign corporations;[72] it may arbitrarily refuse to foreign corporations permission to do business within its territory, or it may give its consent on any conditions which "are not repugnant to the Constitution or laws of the United States, nor inconsistent with those rules of public law which secure the jurisdiction and authority of each state from encroachment by all others, or that principle of natural justice which forbids condemnation without opportunity for defense;"[73] it may impose on a foreign corporation a condition that service of process on the resident agent representative of the corporation on reasonable notice shall be considered a service upon the corporation,[74] and it may prohibit the transaction of the business of insurance within its bounds by a foreign corporation, or it may impose in its discretion conditions on the performance of such business, for contracts of insurance being covenants for indemnity and not articles of commerce, the negotiation and issue of policies of insurance are not transactions of foreign or interstate commerce.[75] But a state cannot, by any alteration of the conditions imposed upon foreign corporations doing business within the state, impair the obligation of contracts lawfully made.[76] So also

[71] Paul *v.* Virginia, 8 Wall. 168; Ducat *v.* Chicago, 10 *id.* 410.

[72] Paul *v.* Virginia, 8 Wall. 168; Ducat *v.* Chicago, 10 *id.* 410; L. I. Co. *v.* Massachusetts, *ibid.* 566; H. S. M. Co. *v.* New York, 143 U. S. 305. See also Kidd *v.* Alabama, 188 *id.* 730.

[73] L. I. Co. *v.* French, 18 How. 404, 407; Paul *v.* Virginia, 8 Wall. 168; St. Clair *v.* Cox, 106 U. S. 350, 356; H. S. M. Co. *v.* New York, 143 *id.* 305; Ashley *v.* Ryan, 153 *id.* 436; Hooper *v.* California, 155 *id.* 648; New York *v.* Roberts, 171 *id.* 658; Bedford *v.* E. B. & L. Assn., 181 *id.* 227.

[74] L. I. Co. *v.* French, 18 How. 404; St. Clair *v.* Cox, 106 U. S. 350, 356.

[75] Paul *v.* Virginia, 8 Wall. 168; Ducat *v.* Chicago, 10 *id.* 410; L. I. Co. *v.* Massachusetts, *ibid.* 566; P. F. Assn. *v.* New York, 119 U. S. 110; Hooper *v.* California, 155 *id.* 648; N. Y. L. I. Co. *v.* Cravens, 178 *id.* 389.

[76] Bedford *v.* E. B. & L. Assn., 181 U. S. 227; *cf.* D. G. Co. *v.* U. S. G. Co., 187 *id.* 611.

a state cannot rightfully impose as a condition the non-exercise by a corporation of its right of removing to the courts of the United States actions brought against it in the courts of the state.[77] If, however, a state prohibit a foreign corporation from doing business within its bounds because the corporation will not forego the exercise of its right of removal of actions, the corporation cannot be protected by an injunction issued by the courts of the United States;[78] but a state statute, requiring foreign corporations as a condition of doing business in a state to stipulate that they will not remove into the courts of the United States causes which under the laws of the United States they would be entitled to remove, is void;[79] and a servant of the corporation[80] cannot be convicted for doing business for a corporation which had not complied with the statute.[81] A substantial compliance by a foreign corporation with the condition on which it is permitted to do business within the bounds of another sovereignty is sufficient; thus, the law of Colorado requiring the filing of a certificate "designating the principal place where the business of such corporation shall be carried on in this state, and an authorized agent or agents, residing at its principal place of business, upon whom process may be served," is sufficiently complied with by a certificate naming the town in which the business is to be carried on and stating "that the general manager of said corporation residing at the said principal place of business, is the agent upon whom process may be served," but not giving the name of the general manager.[82] A foreign corporation does not, by making a single contract for the sale of

[77] H. I. Co. *v.* Morse, 20 Wall. 445; S. P. Co. *v.* Denton, 146 U. S. 202.
[78] Doyle *v.* C. I. Co., 94 U. S. 535; Cable *v.* U. S. L. I. Co., 191 *id.* 288.
[79] Barron *v.* Burnside, 121 U. S. 186.
[80] In this case an engine driver of a foreign railway corporation.
[81] Barron *v.* Burnside, 121 U. S. 186.
[82] Goodwin *v.* C. M. I. Co., 110 U. S. 1.

machinery, come within the provisions of a statute forbidding foreign corporations to "do any business" within the state,[83] but it does come within a similar statute when it loans money upon a note and mortgage solicited by its agent and executed within the state, although the instruments especially stipulate that they are made with reference to and under the laws of the home state of the corporation.[84] Moreover, a foreign insurance company does not cease to do business within the state by withdrawing its agent and refusing new risks if its old policies continue in force and premiums are paid thereon by the policy-holders.[85]

Every one who deals with a foreign corporation impliedly subjects himself to the laws of the foreign government which chartered the corporation, so far as those laws affect the powers and obligations of the corporation or the validity, enforcement, or discharge of its contracts; thus, for instance, a holder in the United States of bonds, issued by a railway corporation of Canada, but negotiated, and stipulated to be paid, in the United States, is bound by the terms of a statutory scheme of arrangement enacted by the Parliament of Canada subsequently to the issue and sale of the bonds.[86] On the same principle, a holder in Louisiana of a policy of life insurance issued in that state by a Missouri corporation is chargeable with notice of the insurance laws of Missouri substituting the insurance commissioner of that state as the representative of insolvent insurance companies.[87]

[83] C. M. Co. *v.* Ferguson, 113 U. S. 727. But see also Fritts *v.* Palmer, 132 *id.* 282; F. & M. C. Co. *v.* Fitzgerald, 137 *id.* 98; C. N. B. & L. Assn. *v.* Denson, 189 *id.* 408.

[84] C. N. B. & L. Assn. *v.* Denson, 189 U. S. 408.

[85] C. M. L. I. Co. *v.* Spratley, 172 U. S. 602.

[86] C. S. Ry. *v.* Gebhard, 109 U. S. 527.

[87] Relfe *v.* Rundle, 103 U. S. 222. See also Pinney *v.* Nelson, 183 *id.* 144.

The I Amendment.

128. The I Amendment declares that "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances." The clause as to religion cannot "be invoked as a protection against legislation for the punishment of acts inimical to the peace, good order, and morals of society;" [88] nor does the clause prevent Congress from declaring the marriage, in a territory or other place over which the United States have exclusive jurisdiction, of any person having a husband or wife living and undivorced, etc., to be bigamy; nor can one convicted of bigamy successfully defend upon his allegation that he religiously believed in plural marriages; [89] nor does this clause prohibit a contract of the commissioners of the District of Columbia with an incorporated charitable association for the application of the moneys of the United States in the construction of hospital buildings in which paupers are to be housed and to be cared for by devotees of the Roman Catholic faith; [90] nor does the clause as to the freedom of speech and of the press prohibit congressional legislation forbidding the transportation of lottery tickets and advertisements by the mails; [91] nor does the Amendment forbid congressional prohibition of the immigration of anarchists.[92]

[88] Per Field, J., Davis *v.* Beason, 133 U. S. 333, 342.

[89] Reynolds *v.* U. S., 98 U. S. 145. See also Mormon Church *v.* U. S., 136 *id.* 1.

[90] Bradfield *v.* Roberts, 175 U. S. 291.

[91] *In re* Rapier, 143 U. S. 110. As to the right of assembly and of petition, see U. S. *v.* Cruikshank, 92 U. S. 542, 552.

[92] U. S. *v.* Williams, 194 U. S. 279, 292.

The XIII Amendment.

129. The XIII Amendment declares that "neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction," and that "Congress shall have power to enforce this Article by appropriate legislation." This provision does not validate an act of Congress which declares it to be a crime to conspire to deprive others of the equal protection of the laws.[93] Nor does the XIII Amendment prohibit the creation of monopolies by a state, such as the exclusive right of providing a place for the slaughtering of cattle.[94] Nor does it prohibit state legislation requiring railway companies to furnish separate accommodations for white and coloured passengers.[95] Nor does it prohibit congressional legislation providing for the punishment of sailors who desert a ship after having contracted to serve upon it.[96] Nor does it invalidate a promissory note made before the adoption of the Amendment, the consideration for which note was the price of a slave, slavery having been lawful by the *lex loci contractus* at the time the note was given,[97] and this rule holds even where the vendor made an express warranty, warranting the chattel to be a slave for life and the warrantor's title to him to be clear and perfect.[98] And, on the same principle, the estate of a former slave-owner may recover from one who used those slaves upon his own plantation a fair rental for their use, estimated to the time when they became free.[99]

[93] U. S. *v.* Harris, 106 U. S. 629.
[94] Slaughter House Cases, 16 Wall. 36.
[95] Plessy *v.* Ferguson, 163 U. S. 537.
[96] Robertson *v.* Baldwin, 165 U. S. 275.
[97] White *v.* Hart, 13 Wall. 646; Boyce *v.* Tabb, 18 *id.* 546.
[98] Osborn *v.* Nicholson, 13 Wall. 654.
[99] Clay *v.* Field, 138 U. S. 464.

The XIV Amendment.

130. The XIV Amendment declares that "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." The purposes of the Amendment are to define citizenship of the United States and of the states, to confer citizenship upon negroes, to secure against hostile legislation of the states those privileges and immunities which are common to citizens of the United States,[100] and to protect all natural persons within the territorial jurisdiction of the United States, without regard to difference of race, colour, nationality, or citizenship.[1] The Amendment does not confer upon women the right of suffrage,[2] nor the right to practice law.[3] The provision that "no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States" protects, it seems, only those rights which are secured against state encroachment by other clauses of the Constitution: it does not extend to state legislation those restrictions which the first eight Amendments impose upon congressional action.[4] Within the meaning of the Constitution, due process of law is secured when the laws operate on all alike and no one is subjected to an arbitrary exercise of the powers of government. The provision does not control

[100] The Slaughter House Cases, 16 Wall. 36. See also Sec. 119, *supra.*

[1] Yick Wo *v.* Hopkins, 118 U. S. 356.

[2] Minor *v.* Happersett, 21 Wall. 162.

[3] Bradwell *v.* The State, 16 Wall. 130.

[4] Maxwell *v.* Dow, 176 U. S. 581. See also Sec. 125, *supra.*

mere forms of procedure, while, on the other hand, the bare observance of legal forms is insufficient when the proceedings are manifestly fraudulent.[5] The prohibition of state legislation which denies to any person the equal protection of the laws, prevents the enactment of laws which discriminate unjustly against any citizen, although special legislation, as such, is not prohibited.[6] And while corporations are persons within the meaning of the Amendment,[7] yet foreign corporations are not entitled to such equal protection of the laws as to have the right to do business within a state without being hampered by such discriminating conditions as the state may choose to impose.[8]

The equal protection of the laws.

131. The provision of the XIV Amendment that no state shall "deny to any person within its jurisdiction the equal protection of the laws" requires that equal security be given to all under like circumstances in the enjoyment of their personal and civil rights. The officers of a municipality may not, in the administration of an ordinance regulating the carrying on of a lawful business within the corporate limits, make arbitrary and unjust discriminations, founded on differences of race, between persons otherwise similarly placed.[9] A state may not, to the prejudice of a coloured man who is put upon his trial for an offense against its laws, refuse to other coloured men the privilege of serving upon the jury, nor compel such prisoner to submit to a trial by a jury from which citizens of African descent are by reason of their

[5] Sec. 117, *supra.*
[6] Sec. 131, *infra.*
[7] Sec. 127, *supra.*
[8] Sec. 127, *supra.*
[9] Yick Wo *v.* Hopkins, 118 U. S. 356.

race excluded;[10] but a prisoner cannot insist upon having a jury composed, either in part or in whole, of his own race, for all that he can rightfully demand is a jury from which men of his race are not excluded because of their colour.[11] A state may not require railroad companies to transport passengers or freight at unreasonably low rates, for in so far as such corporations are denied the right, while others are permitted, to receive reasonable profits upon their invested capital, those corporations are deprived of the equal protection of the laws.[12] So also a statute is unconstitutional which provides, as a penalty upon railroad companies for failure to pay certain debts, that parties successfully suing the companies to recover such debts shall be entitled to attorney's fees, but which gives to the companies no like or corresponding benefit.[13] So also a statute is unconstitutional which, although general in its terms, is designed to limit the charges of a single stockyards company and which does not limit the charges which may be made by similar companies doing like business.[14] And a statute is unconstitutional which prohibits the recovery of the price of articles sold by a trust or combination formed in restraint of trade, but which does not apply to agricultural products or live stock

[10] Strauder *v.* West Virginia, 100 U. S. 303; Bush *v.* Kentucky, 107 *id.* 110; Gibson *v.* Mississippi, 162 *id.* 565; Carter *v.* Texas, 177 *id.* 442; Rogers *v.* Alabama, 192 *id.* 226. See also *Ex parte* Virginia, 100 *id.* 339; Brownfield *v.* South Carolina, 189 *id.* 426.

[11] Virginia *v.* Rives, 100 U. S. 313; Bush *v.* Kentucky, 107 *id.* 110; *In re* Shibuya Jugiro, 140 *id.* 291, 297; Gibson *v.* Mississippi, 162 *id.* 565. See also Williams *v.* Mississippi, 170 *id.* 213; Tarrance *v.* Florida, 188 *id.* 519.

[12] C., M. & St. P. Ry. *v.* Minnesota, 134 U. S. 418; Reagan *v.* F. L. & T. Co., 154 *id.* 362; Smyth *v.* Ames, 169 *id.* 466; L. S. & M. S. Ry. *v.* Smith, 173 *id.* 684; *cf.* L. & N. R. *v.* Kentucky, 183 *id.* 503; M. & St. L. R. *v.* Minnesota, 186 *id.* 257.

[13] G., C. & S. F. Ry. *v.* Ellis, 165 U. S. 150. See, however, A., T. & S. F. R. *v.* Matthews, 174 *id.* 96; and also F. M. L. Assn. *v.* Mettler, 185 *id.* 308; I. L. I. Co. *v.* Lewis, 187 *id.* 335; F. & M. I. Co. *v.* Dobney, 189 *id.* 301.

[14] Cotting *v.* K. C. S. Y. Co., 183 U. S. 79.

in the hands of the producer or raiser.[15] A corporation is a person within the meaning of the Amendment.[16]

But a law is presumptively constitutional whenever it operates alike on all persons and property similarly situated, and while a state may not make a classification of the objects of legislation an excuse for an unjust discrimination, or the oppression or spoliation of a particular class, yet special legislation, as such, is not prohibited by the Amendment.[17] A state may grant a monopoly of the slaughtering of cattle.[18] It may require that prior to the admission to its territory of a corporation of another state,

[15] Connolly *v.* U. S. P. Co., 184 U. S. 540.

[16] Santa Clara County *v.* S. P. R., 118 U. S. 394; P. M. Co. *v.* Pennsylvania, 125 *id.* 181; G., C. & S. F. Ry. *v.* Ellis, 165 *id.* 150; Smyth *v.* Ames, 169 *id.* 466; L. S. & M. S. Ry. *v.* Smith, 173 *id.* 684; M. P. Ry. *v.* Mackey, 127 *id.* 205; M. & St. L. Ry. *v.* Herrick, *ibid.* 210; M. & St. L. Ry. *v.* Beckwith, 129 *id.* 26; C., C. & A. R. *v.* Gibbes, 142 *id.* 386; C. & L. T. Co. *v.* Sandford, 164 *id.* 578.

[17] "Class legislation, discriminating against some and favouring others, is prohibited, but legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the Amendment:" Barbier *v.* Connolly, 113 U. S. 32. "Arbitrary selection can never be justified by calling it classification. . . . It is apparent that the mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the XIV Amendment, and that in all cases it must appear not only that a classification has been made, but also that it is one based upon some reasonable ground—some difference which bears a just and proper relation to the attempted classification—and is not a mere arbitrary selection:" G., C. & S. F. Ry. *v.* Ellis, 165 U. S. 159, 165. "The question in each case is whether the legislature has adopted the statute in exercise of a reasonable discretion, or whether its action be a mere excuse for an unjust discrimination, or the oppression or spoliation of a particular class:" Holden *v.* Hardy, 169 U. S. 398. "Classification . . . is not invalid because not depending on scientific or marked differences in things or persons in their relations. It suffices if it is practical, and is not reviewable unless palpably arbitrary:" O. I. Co. *v.* Daggs, 172 U. S. 562. "The very idea of classification is that of inequality, so that it goes without saying that the fact of inequality in no manner determines the matter of constitutionality:" A., T. & S. F. R. *v.* Matthews, 174 U. S. 106.

[18] Slaughter House Cases, 16 Wall. 36.

such conditions as it may designate shall be observed;[19] it may prohibit a white and a negro from living togther in adultery or fornication under more severe penalties than those to which the parties would be subjected were they of the same race and colour;[20] it may classify railroads for the purpose of regulating fares,[21] and may establish reasonable rates of fare;[22] it may reasonably limit the rates of water supply companies;[23] it may fix the tolls which may be charged by turnpike companies,[24] and the rates which may be charged by grain elevator companies,[25] and in neither case is it necessary that the regulations so imposed be uniform throughout the state; it may make railroad corporations,[26] or all corporations,[27] liable for injuries to employees caused by the negligence of fellow-employees; it may prohibit the sale of oleomargarine within its limits;[28] it may prohibit the manufacture and sale of oleomargarine which contains colouring matter, although permitting the use of colouring matter in butter;[29] it may authorize municipalities to improve streets and to assess the owners of adjoining lots

[19] P. M. Co. *v.* Pennsylvania, 125 U. S. 181; H. S. M. Co. *v.* New York, 143 *id.* 305; New York *v.* Roberts, 171 *id.* 658.

[20] Pace *v.* Alabama, 106 U. S. 583.

[21] Dow *v.* Beidelman, 125 U. S. 680.

[22] St. L. & S. F. Ry. *v.* Gill, 156 U. S. 649; Reagan *v.* F. L. & T. Co., 154 *id.* 362; Smyth *v.* Ames, 171 *id.* 361; M. & St. L. R. *v.* Minnesota, 186 *id.* 257. See also C., M. & St. P. Ry. *v.* Tompkins, 176 *id.* 167; L. & N. R. *v.* Kentucky, 183 *id.* 503.

[23] Stanislaus County *v.* S. J. & K. R. C. & I. Co., 192 U. S. 201.

[24] C. & L. T. Co. *v.* Sandford, 164 U. S. 578.

[25] Munn *v.* Illinois, 94 U. S. 113, two justices dissenting; Budd *v.* New-York, 143 *id.* 517, three justices dissenting; Brass *v.* North Dakota, 153 *id.* 391, four justices dissenting.

[26] M. P. Ry. *v.* Mackey, 127 U. S. 205; M. & St. L. Ry. *v.* Herrick, *ibid.* 210.

[27] Tullis *v.* L. E. & W. R., 175 U. S. 348.

[28] Powell *v.* Pennsylvania, 127 U. S. 678. It may not, however, regulate commerce by prohibiting the sale, in original packages, of oleomargarine brought from other states: Schollenberger *v.* Pennsylvania, 171 U. S. 1.

[29] C. C. D. Co. *v.* Ohio, 183 U. S. 238.

for the benefits accruing to them from the improvements;[30] and it may provide that the proposed improvements shall not be made if a majority of the resident holders of adjoining property protest, although the privilege of interference is not given to non-residents, where there is no discrimination in the assessment for the improvements;[31] it may impose upon railroad companies liability to punitive damages for injuries caused by their omission to fence their tracks as required by law;[32] it may impose upon railway companies alone a penalty for allowing certain weeds to go to seed upon their right of way;[33] it may tax corporate securities at their face value,[34] and may classify property[35] and occupations[36] for the purpose of taxation, for the Amendment was not intended to compel the states to adopt an iron rule of equal taxation; it may tax all companies exercising the franchises of corporations within its limits on the privilege of exercising those franchises;[37] it may require the railroad companies of the state to pay the expenses of the state railroad commission,[38] and the electric companies to pay the salaries of

[30] Walston *v.* Nevin, 128 U. S. 578; French *v.* B. A. P. Co., 181 *id.* 324; Detroit *v.* Parker, *ibid.* 399; Shumate *v.* Heman, *ibid.* 402; Chadwick *v.* Kelley, 187 *id.* 540; Schaefer *v.* Werling, 188 *id.* 516; *cf.* Norwood *v.* Baker, 172 *id.* 269.

[31] Field *v.* B. A. P. Co., 194 U. S. 618.

[32] M. P. Ry. *v.* Humes, 115 U. S. 512; M. & St. L. Ry. *v.* Beckwith, 129 *id.* 26; M. & St. L. Ry. *v.* Emmons, 149 *id.* 364.

[33] M., K. & T. Ry. *v.* May, 194 U. S. 267. Three justices dissented.

[34] B. G. R. *v.* Pennsylvania, 134 U. S. 232; Jennings *v.* C. R. C. Co., 147 *id.* 147.

[35] Kentucky R. Tax Cases, 115 U. S. 321; A. Ex. Co. *v.* Ohio, 165 *id.* 194; Magoun *v.* I. T. & S. Bank, 170 *id.* 283; Orr *v.* Gilman, 183 *id.* 278; F. C. & P. R. *v.* Reynolds, *ibid.* 471; Billings *v.* Illinois, 188 *id.* 97; Kidd *v.* Alabama, *ibid.* 730; Missouri *v.* Dockery, 191 *id.* 165. See also M. & M. Bank *v.* Pennsylvania, 167 *id.* 461; Connolly *v.* U. S. P. Co., 184 *id.* 540.

[36] Giozza *v.* Tiernan, 148 U. S. 657; Clark *v.* Titusville, 184 *id.* 329.

[37] H. I. Co. *v.* New York, 134 U. S. 594.

[38] C., C. & A. R. *v.* Gibbes, 142 U. S. 386.

the subway commissioners;[39] it may provide that licenses to sell liquor shall not be granted save on the compliance by the applicant with certain conditions, which conditions may be more burdensome than those imposed upon persons engaged in other lines of business;[40] it may allow a county or smaller district to prohibit the sale of liquor within its limits, but, discriminating in favour of prohibition, forbid the sale in the smaller district when it is prohibited by the county containing that district;[41] and it may allow a municipality to prohibit the sale or gift of liquors except by druggists, manufacturers, persons who give away liquors in their private dwellings, and railway corporations dispensing liquors in their cars under state license;[42] it may apportion the movable property of railroads among its counties for assessment and taxation without so apportioning property owned by other corporations or by individuals;[43] it may require all railroad companies to remove grade crossings under certain conditions;[44] it may require grain elevator companies to insure grain stored by them;[45] it may provide that persons who have been before convicted of crime shall suffer severer punishment for subsequent offenses than for a first offense against the law;[46] it may provide that lands on the banks of a river may be taken for levees without compensation, the provision applying alike to all owners of riparian lands;[47] it may require that white and coloured passengers on railroads within the state be transported in sepa-

[39] New York *v.* Squire, 145 U. S. 175.
[40] Giozza *v.* Tiernan, 148 U. S. 657.
[41] Rippey *v.* Texas, 193 U. S. 504.
[42] Ohio *v.* Dollison, 194 U. S. 445.
[43] C. S. Ry. *v.* Wright, 151 U. S. 470.
[44] N. Y. & N. E. R. *v.* Bristol, 151 U. S. 556.
[45] Brass *v.* North Dakota, 153 U. S. 391.
[46] Moore *v.* Missouri, 159 U. S. 673; McDonald *v.* Massachusetts, 180 *id.* 311.
[47] Eldridge *v.* Trezevant, 160 U. S. 452.

rate cars;[48] it may provide that the costs in actions improperly instituted shall be borne by the prosecutor;[49] it may make railroad companies liable in damages for all fires along their routes caused by their locomotives,[50] and provide, as a police regulation, that in an action to recover such damages the plaintiff, if successful, shall be allowed a reasonable attorney's fee;[51] it may provide that in successful actions against life and health insurance companies the plaintiff shall be allowed an attorney's fee, although a similar condition is not imposed on other insurance companies or on mutual relief associations;[52] it may allow to a successful plaintiff an attorney's fee in a suit on a policy covering real estate where the property has been totally destroyed, and exclude the right to such fee in suits to enforce policies on other classes of property, or where there has not been a total destruction of the property covered by the insurance;[53] it may provide that under certain conditions a change of venue shall be allowed to a party suing or sued by a corporation having more than fifty stockholders;[54] it may provide that any person who drives a herd over a public highway, where such highway is constructed on a hillside, shall be liable for all damages caused by such animals, without imposing this absolute liability on those who move animals otherwise than in herds;[55] it may regulate the heating of steam passenger cars, although at the same time it declares that the regulations shall not apply to railroads less than fifty

[48] Plessy *v.* Ferguson, 163 U. S. 537.

[49] Lowe *v.* Kansas, 163 U. S. 81.

[50] St. L. & S. F. Ry. *v.* Mathews, 165 U. S. 1.

[51] A., T. & S. F. R. *v.* Matthews, 174 U. S. 96. Four justices dissented.

[52] F. M. L. Assn. *v.* Mettler, 185 U. S. 308. See also I. L. I. Co. *v.* Lewis, 187 *id.* 335.

[53] F. & M. I. Co. *v.* Dobney, 189 U. S. 301. Three justices dissented.

[54] C. S. Ry. *v.* Snell, 193 U. S. 30.

[55] Jones *v.* Brim, 165 U. S. 180.

miles in length;[56] it may limit the hours of labour in mines,[57] and on public contracts;[58] it may commit to administrative officers the power to determine the right of citizens to serve as jurors, and it does not deny to any person accused of crime the equal protection of the laws unless discrimination against certain classes of citizens is shown in the actual administration of the statute;[59] it may provide that in suits on policies of fire insurance the defendant shall not be permitted to deny that the value of the property destroyed was that set forth in the policy of insurance, although no such provision is made concerning insurance against the destruction of property from causes other than fire;[60] it may give to residents priority over non-resident corporations in the distribution of the assets of insolvent debtors, for the prohibition relates only to the denial by the state of equal protection to persons "within its jurisdiction;"[61] it may provide that if on the day of discharge of any railroad employee the wages then due to him be not paid the railroad shall be subject to a penalty;[62] it may provide that in a trial for murder the court may, on the motion of either the state or the prisoner, order a struck jury, and that in such case the accused shall be allowed only five peremptory challenges, while in ordinary trials for murder the accused

[56] N. Y., N. H. & H. R. *v.* New York, 165 U. S. 628.

[57] Holden *v.* Hardy, 169 U. S. 366. Two justices dissented.

[58] Atkin *v.* Kansas, 191 U. S. 207. Three justices dissented.

[59] Williams *v.* Mississippi, 170 U. S. 213; Tarrance *v.* Florida, 188 *id.* 519; *cf.* Carter *v.* Texas, 177 *id.* 442; Rogers *v.* Alabama, 192 *id.* 226. But the Amendment does not protect individuals against unauthorized acts by state officials: Barney *v.* City of New York, 193 U. S. 430. See also Arbuckle *v.* Blackburn, 191 *id.* 405.

[60] O. I. Co. *v.* Daggs, 172 U. S. 557.

[61] Blake *v.* McClung, 172 U. S. 239; Sully *v.* American Nat. Bank, 178 *id.* 289.

[62] St. L., I. M. & St. P. Ry. *v.* Paul, 173 U. S. 404.

shall be allowed twenty peremptory challenges;[63] it may provide for the indictment of prisoners by information and their trial by a jury composed of eight instead of twelve jurors;[64] it may declare a presumption that policy slips are held for an unlawful purpose when in the possession of persons other than public officers;[65] it may authorize municipalities to annex adjoining tracts of land used for other than agricultural purposes;[66] it may prohibit all labour on Sunday except works of necessity and charity, providing, as a matter of law, that the keeping of a barber shop on Sunday shall not be deemed to be a work of necessity, but leaving the character of other kinds of labour to be determined as questions of fact;[67] it may impose a license tax upon persons and corporations carrying on the business of refining sugar and molasses, while exempting from such taxation planters who refine their own sugar and molasses;[68] it may tax persons who are engaged in hiring labourers to be employed beyond the limits of the state, although no such tax is imposed upon the business of hiring persons to labour within the state;[69] it may provide that misstatements, other than fraudulent, in answer to interrogatories in applications for policies of life insurance shall not invalidate policies issued on the strength of those answers;[70] it may establish two district criminal courts and allow to the state an appeal from one of these courts although not allowing to it an appeal from the other;[71] it may provide that the

[63] Brown *v.* New Jersey, 175 U. S. 172. See also Hayes *v.* Missouri, 120 *id.* 68.

[64] Maxwell *v.* Dow, 176 U. S. 581.

[65] Adams *v.* New York, 192 U. S. 585.

[66] Clark *v.* Kansas City, 176 U. S. 114.

[67] Petit *v.* Minnesota, 177 U. S. 164.

[68] A. S. R. Co. *v.* Louisiana, 179 U. S. 89.

[69] Williams *v.* Fears, 179 U. S. 270.

[70] H. M. L. I. Co. *v.* Warren,, 181 U. S. 73.

[71] Mallet *v.* North Carolina, 181 U. S. 589.

real estate of corporations shall be assessed by a procedure different from that used in determining the value of real estate owned by individuals;[72] it may require the assessement of railroad property which escaped taxation in preceding years, without providing for the assessment of other property which escaped taxation in the same period;[73] it may prohibit railway companies from charging more for shorter than for longer hauls, except by permission of the railroad commission;[74] it may prohibit the making of options for the purchase or sale of commodities;[75] it may prohibit contracts for the sale of corporate stock on margin;[76] and it may provide for the inspection of all mines in which more than five men are employed, and, after stipulating the fees to be charged by the inspectors, permit them to determine the number of inspections per year required by each mine.[77] So also a municipality may forbid the use of steam-power by railways on designated streets without forbidding its use by companies which traverse other streets of the city;[78] it may forbid washing and ironing in public laundries within definite limits between prescribed hours;[79] it may prohibit the keeping of a private market within six squares of a public market,[80] and it may forbid the maintenance of a cow stable within municipal limits without the permission of the municipal assembly.[81] So also a saloonkeeper may be denied a renewal of his license upon the

[72] New York *v.* Barker, 179 U. S. 279. See also F. C. & P. R. *v.* Reynolds, 183 *id.* 471.

[73] F. C. & P. R. *v.* Reynolds, 183 U. S. 471.

[74] L. & N. R. *v.* Kentucky, 183 U. S. 503.

[75] Booth *v.* Illinois, 184 U. S. 425.

[76] Otis *v.* Parker, 187 U. S. 606.

[77] St. L. C. C. Co. *v.* Illinois, 185 U. S. 203.

[78] Railroad Co. *v.* Richmond, 96 U. S. 521.

[79] Barbier *v.* Connolly, 113 U. S. 27; Soon Hing *v.* Crowley, *ibid.* 703.

[80] Natal *v.* Louisiana, 139 U. S. 621.

[81] Fischer *v.* St. Louis, 194 U. S. 361.

ground that he is not a suitable person to conduct the business;[82] a prisoner may be tried and sentenced by a judge *de facto* of a court *de jure;*[83] a prisoner convicted of conspiracy to defraud may be subjected to a heavier sentence than is imposed on a co-conspirator;[84] judicial procedure may be regulated, provided the same course of procedure be applied to all persons under similar conditions;[85] a board of education which has not sufficient funds to maintain two high schools may exclude negroes from a high school which is maintained for the benefit of white students;[86] and a mayor may be given authority to grant or refuse permission to move buildings along the streets of a city.[87] The power of enforcement by appropriate legislation, vested by the Amendment in Congress, does not authorize congressional legislation with regard to individuals, for the Amendment restrains state and not individual action; it has, therefore, been held that Section 5519, Revised Statutes of the United States, declaring it to be a crime punishable by fine and imprisonment for any two or more persons to conspire to deprive any person of the equal protection of the law is unconstitutional.[88] It has also been held that the Civil Rights legislation of Congress[89] declaring that all persons within the jurisdiction of the United States shall be entitled to the full and equal enjoyment of inns, transportation facilities, etc., and subjecting to fine and imprisonment, and also to

[82] Crowley *v.* Christensen, 137 U. S. 86.

[83] *In re* Manning, 139 U. S. 504.

[84] Howard *v.* Fleming, 191 U. S. 126.

[85] Duncan *v.* Missouri, 152 U. S. 377; Tinsley *v.* Anderson, 171 *id.* 101; Maxwell *v.* Dow, 176 *id.* 581; *cf.* Missouri *v.* Lewis, 101 *id.* 22; Brown *v.* New Jersey, 175 *id.* 172; Minder *v.* Georgia, 183 *id.* 559.

[86] Cumming *v.* Board of Education, 175 U. S. 528.

[87] Wilson *v.* Eureka City, 173 U. S. 32. See also Davis *v.* Massachusetts, 167 *id.* 43; Gundling *v.* Chicago, 177 *id.* 183.

[88] U. S. *v.* Harris, 106 U. S. 629.

[89] Act 1st March, 1875, 18 Stat. 335.

a liability to damages in an action at law, any person violating the provisions of the statute, is unauthorized by the Amendment, the ground of decision being that the Amendment is prohibitory of state legislation and action, and that, therefore, it is not in the power of Congress to directly legislate for the protection of individual rights against wrong doing by individuals.[90]

The police power.

132. The police power is that function of government, by the exercise of which, all persons, who are subject to the sovereignty of the government exercising the power, are, for ends of public policy, restrained in their use, or enjoyment, of some right of person or of property. The police power may attain its end by absolutely prohibiting the exercise of a particular right, or by so regulating the exercise of that right as to permit its use under conditions, and, if the power exists, the extent to which it may be exercised in any case is limited only by the will of the government, or the department thereof, in which the power may be vested, unless a restraint be imposed by organic law. It is clear that the United States cannot exercise within the territory of a state any portion of the state's police power, but it is equally clear that the United States can exercise therein whatever of the police power is applicable to the protection or regulation of the rights of person or of property which are granted by the Constitution of the United States. It may be said upon one side, that the autonomy of the states is nothing more than a name, if the police power is not to be exclusively exercised by them, and that the constitutional grant to the United States of any power which in its exercise may affect the internal

[90] Civil Rights Cases, 109 U. S. 3. See also Barney *v.* City of New York, 193 *id.* 430.

concerns of a state must be understood to have been made on the implied condition that its exercise is to be subject to the police power of the state. It may be said, on the other side, that, as the power of police involves a power not only to control, but also to forbid, the powers granted by the Constitution to the United States would be nugatory, if the states might veto, under the pretense of regulating. It may be repeated here as it has been said in another connection,[91] that while the states did not, by the adoption of the Constitution, surrender their local powers of government, yet, nevertheless, the territorial limits of each state's jurisdiction, the grant to the United States of powers conflicting with state sovereignty, and a due regard to the right of citizens of other states, must so limit each state's otherwise unlimited police powers, that those powers shall not be so exercised as to interfere with the full exercise of the powers granted to the United States. Therefore, persons or property brought within the territory of a state in the exercise of any federal right are exempt from obstructive state control until the federal power shall have ceased to operate, and the persons, or property, on which it acted shall have merged in the mass of persons, or property, within the territory of the state.

[91] *Supra,* p. 70.

CHAPTER XII.

THE FEDERAL SUPREMACY AND THE RESERVED RIGHTS OF THE STATES.

133. The results of federal supremacy.
134. The constitutional reservation of the rights of the states.
135. The nature and extent of those reserved rights.
136. The importance of the preservation of the rights of both the United States and the states.

The results of federal supremacy.

133. A consideration of the cases which have been cited in the preceding chapters of this book leads to the conclusion that the supremacy of the government of the United States, within its constitutional sphere of action, involves: *first,* the exercise of judicial power by the government of the United States for the purposes of enforcing the rights created by the Constitution, laws, and treaties of the United States, of punishing offenses against the laws of that government, and of finally determining the judicial construction of the Constitution, statutes, and treaties of the United States, and of the constitutions and statutes of the states, so far as regards subjects of federal jurisdiction; *second,* the exemption of all property and agencies of the federal government from state control; and *third,* the non-exercise by the states of powers clashing with the powers granted by the Constitution to the government of the United States.

The constitutional reservation of the rights of the states.

134. Articles IX and X of the Amendments to the Constitution declare that, "the enumeration in the Constitution of certain rights shall not be construed to deny

or disparage others retained by the people. . . . The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.'' If these Amendments had never been adopted, the construction of the Constitution as a whole would lead inevitably to the conclusion that, in so far as the states are not controlled by the expressed or implied restrictions contained in the Constitution of the United States, they may severally exercise all the powers of independent governments.[1]

The nature and extent of those reserved rights.

135. The nature and extent of the reserved rights of the states must be determined by a process of reasoning by exclusion, involving a statement of the express and implied constitutional restraints upon freedom of state action, and a conclusion that any state may, so far as the United States are concerned, rightfully exercise every power of government which is not included within the specific restraints thus enumerated. A consideration of the terms of the Constitution and of the effect of the judgments of the court, which have been cited in the preceding chapters of this book, renders it easy to formulate a statement of the general nature of the constitutional restraints upon the states. By force of those restraints, a state cannot withdraw from the Union, nor deprive itself of its rights as one of the United States, nor emancipate itself from the constitutional limitations upon freedom of state action; it cannot have any international relations with foreign states, nor with any other of the United States; it cannot enter into treaties with foreign powers, nor make interstate compacts; it cannot engage in war, unless actually invaded, or in such imminent danger as will not

[1] *Supra,* Section 3.

admit of delay; it cannot grant letters of marque and reprisal; it cannot adopt any other than a republican form of state government,[2] nor grant any title of nobility; it cannot prescribe the conditions of its citizenship, for the birth within the United States of any person subject to their jurisdiction, or the naturalization of any person under the acts of Congress, followed, in either case, by residence within a state, makes the person so born or naturalized, and so residing, a citizen of that state; it may not, under the penalty of a reduction in the basis of representation, deny or abridge the right to vote at elections for electors, congressmen, state executive, or judicial officers, or legislators of any male inhabitant twenty-one years of age and a citizen of the United States; it cannot, in its regulation of the exercise of the right of suffrage by its citizens, discriminate because of race, colour, or previous condition of servitude; it cannot in its action with regard to its own citizens or with regard to temporary denizens within its territory, abridge those privileges or immunities which are common to citizens of the United States, nor deprive any person of life, liberty, or property, without due process of law, nor deny to any person the equal protection of the laws; it cannot deny to citizens of other states those privileges and immunities of citizenship which it allows to its own citizens; it cannot control or regulate the immigration or residence of aliens; it cannot tax the property of the United States, nor the agencies em-

[2] Section 4 of Article IV of the Constitution requires the United States to "guaranty to every state in this Union a republican form of government." It rests with Congress to decide what government is the established one in a state, and also to determine upon the means proper to be adopted to fulfil the guaranty of a republican form of government to the states: Luther *v.* Borden, 7 How. 1, 42. See also Taylor and Marshall *v.* Beckham, 178 U. S. 548. Chase, C. J., pointed out in Texas *v.* White, 7 Wall. 727, that this constitutional obligation required the United States, after the suppression of the Rebellion, to re-establish the representation in Congress of the states lately in rebellion.

ployed by the United States in the execution of its constitutional powers to such an extent as to interfere with the full performance by such agents of their duties to the United States, nor the subjects of foreign or interstate commerce in such a manner as to amount to a regulation of such commerce, nor lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws, nor lay any duty on tonnage; it cannot coin money, nor emit bills of credit, nor make anything but gold and silver coin a tender in payment of debts; it cannot, by any law or by any act to which it, by its enforcement thereof, gives the force of a law, deprive a party of the legal right of enforcing, or obtaining compensation for the breach of, an express and valid contract, executed or executory; it cannot regulate commerce, foreign or interstate, or with the Indian tribes, by obstructing or burdening, or discriminating against, such commerce; it cannot exercise judicial jurisdiction over persons or subject-matters rightfully withdrawn by the United States from its jurisdiction, and in its exercise of jurisdiction it cannot derogate from the supremacy of the Constitution, laws, and treaties of the United States, nor fail to give full faith and credit to the public acts, records, and judicial proceedings of every other state; it cannot pass any bill of attainder or *ex post facto* law; and it cannot so exercise its powers of police regulation as to interfere with the exercise of the constitutional powers of the United States, or, in other words, in such manner as to operate upon persons or property brought within its jurisdiction in the exercise of powers granted to the United States, before such persons or property shall have lost their distinctive character and merged in the mass of persons or property within the territory of the state. Such are substantially the constitutional restraints upon the powers of the states; and their practical effect is

that, while limiting the powers of each state in that which concerns foreign nations, and in that which affects the interests of other states, and of the citizens of those other states, it yet reserves to each state full powers of self-government in all that affects only the interests of that state and of its own citizens.

The importance of the preservation of the rights of both the United States and the states.

136. The Constitution was the result of a struggle between contending parties, the one fearing a disintegration of the Union as a consequence of the weakness of the confederation, and striving to create a nation, and the other mindful of the contest for the independence of the colonies, and seeking to sacrifice as little as possible of the autonomy of the states. Fortunately for the peace and prosperity of the country, and for the permanency of its free institutions, neither party triumphed, and their conflict of opinion gave birth to a government, which, though national in its relations to foreign powers, and in the directness of its action upon the citizens of the several states, is also federal in its reservation to the states and the people of all powers not expressly, or by necessary implication, granted to the United States. The distinguishing characteristics of the Constitution, thus created, are the limitation in terms of the powers confided to the United States, the reservation to the states of the right of local self-government, and that practical conservatism, which is the necessary consequence of the supremacy of a written Constitution, whose manner of amendment guards it against hasty changes. The government created by that Constitution has stood the tests of time and growth; its nationality has survived the shocks of foreign and of civil war; and its recognition of the principle of

home rule has overcome the disintegrating tendencies of the expansion of territory and the increase of population. That in the future as in the past the United States may escape the perils of dissolution and the dangers of consolidation, it is necessary that its Constitution be maintained in its integrity, and that the reserved rights of the states, and the supremacy of the United States within the limits of its delegated powers, be alike jealously guarded. So long as that just equipoise of federal and of state power shall be preserved, and so long as the mass of the people shall continue to be God-fearing and law-abiding, and shall steadfastly resist any usurpation of power, by whomsoever made, the United States will triumph over all that may endanger the perpetuity of their free institutions.

INDEX.

The references are to the pages.

ACTIONS.

Against the United States, 209, 212.
Against a state by the United States, 209.
Between states, 211.
Between a state and citizens of another state, 213, 258.
Between citizens of different states, 210, 215, 239.
Legislation affecting, as impairing contracts, 142, 143.
Legislation affecting, as denying due process of law, 275, 279.
See also JUDICIAL POWER.

ADMIRALTY.

Jurisdiction in, 206.

AGENCIES.

Federal, state taxation of, 44.
State, federal taxation of, 39.

ALIENS.

Admission and naturalization of, 291, 296.

ALLIANCES.

By states forbidden, 191.

AMBASSADORS.

Jurisdiction in cases affecting, 197, 206, 221.

AMENDMENTS.

First eight limit only federal government, 258, 298.
I, 309.
IV, 245.
V, 247, 251, 297.
VI, 253.
VII, 255.
VIII, 257.
XI, 258.
XIII, 310.
XIV, purposes of, 311.
XIV, citizenship, 290, 292.
XIV, privileges and immunities of citizenship, 298.

The references are to the pages.

AMENDMENTS—*Continued.*
XIV, due process of law, 273, 297.
XIV, equal protection of the laws, 312.
XIV, right of suffrage, 292.
XV, 291, 293, 294, 295.

APPELLATE JURISDICTION. See JUDICIAL POWER.

ATTAINDER.
Prohibition of bills of, 182.
Bills of, defined, 187.
Bills of, illustrations of, 188.

BANKS, NATIONAL.
Power of Congress to create, 17.
State taxation of, 48.
Federal taxation of, 17, 23.

BANKS, STATE.
Federal taxation of, 17, 40.

BILLS OF ATTAINDER. See ATTAINDER.

BILLS OF CREDIT.
Prohibition of state, 189.
Definition of, 189.
Illustrations of, 189, 190.

BILLS OF EXCHANGE.
Dealing in, taxable by states, 55, 62.

BILLS OF LADING.
State taxation of, 63.

BRIDGES.
Regulation of, 82.

CARRIERS. See RAILWAYS, SHIPPING.

CASES.
Requisites of judicial, 228.
See also ACTIONS, JUDICIAL POWER.

CHARTERS.
As contracts, 163, 165, 168.
Implied contracts in, 170, 173, 174, 176.

CIRCUIT COURTS OF THE UNITED STATES.
Jurisdiction of, 219, 221.

The references are to the pages.

CIRCUIT COURTS OF APPEALS OF THE UNITED STATES.

Jurisdiction of, 219, 226.

CITIZENS.

Of the United States, 290.
Of a state, 291, 292.
Privileges and immunities of citizens of the United States, 298.
Privileges and immunities of citizens of one state within another state, 300.
Right to vote not a privilege of citizenship, 292.
Discriminations in state regulation of suffrage, 293.
Right to serve on juries, 295.

CIVIL RIGHTS.

Federal regulation of, unconstitutional, 322.

CLASSIFICATION.

Of persons or property for purposes of state legislation, 314.
Uniformity in federal taxation, 26, 35, 37.

COLONIES. See TERRITORIES.

COLOURED PERSONS.

Separate transportation, 98, 317.
Exclusion from schools for white students, 322.
Federal regulation of civil rights unconstitutional, 322.
Right to vote, 292.
Right to serve on juries, 295, 312.

COMITY, INTERSTATE. See ALLIANCES, FULL FAITH AND CREDIT.

COMMERCE.

Definition of, 62.
Regulation of, 59, 64.
Constitutional provisions as to, 59.
Historical reason for provisions, 61.
Federal statutes regulating, 66.
Limits of federal and state regulation of, 68.
Taxation as regulation of, 54, 90.
Distinction between internal and foreign or interstate, 68.
Internal commerce, 70.
With Indian tribes, 135.

COMMON LAW.

Theory of judicial system under, 199.
In federal courts, 239.

The references are to the pages.

COMPACTS BETWEEN STATES, 191.

COMPENSATION.
For private property taken for public use, 253, 277, 278.

CONCURRENT JURISDICTION.
Of federal and state courts, 217, 268.

CONFLICT OF JURISDICTION.
Between federal and state courts, 265.

CONSTITUTION OF THE UNITED STATES.
By whom ratified, 1.
Effect of ratification of, 1.
Rules of construction of, 233, 234.
Supremacy of, 325.

CONSTRUCTION OF CONSTITUTION AND STATUTES.
Rules of, 232, 233.

CONSULAR COURTS.
Establishment of, 19, 246.

CONSULS.
Jurisdiction in cases affecting, 197, 206, 221.

CONTRACTS.
Prohibition of impairment of obligation of, 137.
Prohibition affects only state laws, 137.
"Law" defined, 138.
"Obligation" defined, 142.
"Contracts" defined, 147.
History of the prohibition, 155.
Judgments of state courts, as to non-existence or non-impairment, not conclusive, 141.
Contracts made by states, 160.
Contracts made by political subdivisions, 154.
Contracts of states with political subdivisions, 170.
Regulation of remedies, 142.
Judgments as contracts, 153.
Charters as contracts, 162, 163, 170.
Contracts implied in charters, 170.
Express exemption from state taxation, 52, 161.
Implied exemption from state taxation, 52, 173.
Express grants of peculiar privileges, 168.
Implied grants of peculiar privileges, 174.

The references are to the pages.

CONTRACTS—*Continued.*
Exemption from police power, 176.
Contracts as to matters of public concern, 178.
Constitutional prohibition as affecting suits against states, 180.
Force and effect of constitutional prohibition, 181.

CONTRACTS IN RESTRAINT OF TRADE.
Under Anti-trust Act and at common law, 124.

CONTROVERSIES. See ACTIONS.

CORPORATIONS.
Citizenship of, for jurisdictional purposes, 303.
Not citizens within meaning of Art. IV, sec. 2, 304.
Persons within meaning of XIV Amendment, 304, 314.
Foreign, 303, 314.

COUNSEL FOR DEFENSE.
Right to, 254.

COURTS, FEDERAL. See JUDICIAL POWER; SUPREME COURT; CIRCUIT COURTS OF APPEAL; CIRCUIT COURTS; DISTRICT COURTS.

COURTS, STATE. See JUDICIAL POWER.

COURTS-MARTIAL.
Jurisdiction of, 243, 247.

CREDIT, BILLS OF. See BILLS OF CREDIT.

CRIMES.
Ex post facto laws prohibited, 182.
Federal judicial procedure, 246-258.
Due process of law in state judicial procedure, 273-276, 280.
Equal protection of the laws in state judicial procedure, 312, 317, 319, 320, 322.
Cruel and unusual punishments, 257.

CRUEL AND UNUSUAL PUNISHMENTS.
Prohibited, 257.

CURRENCY.
Legal tender, 20.
Bills of credit, 189.

DAMS.
Regulation of, 82.

The references are to the pages.

DIRECT TAXATION.
By United States, 30.

DISTRICT COURTS OF THE UNITED STATES.
Jurisdiction of, 219, 222.

DIVORCE.
Not impairment of contract, 148.
Recognition of decrees obtained in other states, 283, 286.

DUE PROCESS OF LAW.
Under V Amendment, 247, 297.
Under XIV Amendment, 273, 311.

DUTIES. See EXPORTS, IMPORTS.

EIGHTH AMENDMENT.
Cruel and unusual punishments, 257.

ELECTIONS.
State regulation of, 292.
Federal regulation of, 293, 295.

ELEVENTH AMENDMENT.
Effect of, 258.

EQUAL PROTECTION OF THE LAWS.
Right to, 312.

EXCISES.
Requirement of uniformity of, 35.

EXPORTS.
State taxation of, 43, 87.
State inspection of, 89.
Term not applicable to interstate commerce, 73.
Term as applied to commerce with Porto Rico, 12, 27, 28, 37, 73.
Taxation of, by United States, 28, 73.

EX POST FACTO LAWS.
Prohibition of, 182.
Definitions of, 184.
Illustrations of, 185.

EXPRESSED RESTRAINTS.
On states, 4.

The references are to the pages.

EXTRADITION.
From other states, 193.

FAITH AND CREDIT.
To statutes, records, and judgments of other states, 280.

FERRIES.
Taxation of, 54, 57, 82.
Regulation of, 81, 100.

FIFTEENTH AMENDMENT, 291, 293, 294, 295.

FIFTH AMENDMENT.
Prosecution upon information, 247.
Due process of law, 247.
Putting twice in jeopardy, 251.
Compelling accused to be a witness against himself, 252.
Compensation for property taken, 253.

FIRST AMENDMENT, 309.

FISHING.
State regulation of, 72, 274, 299, 301.

FOREIGN CORPORATIONS.
Rights and liabilities of, 303.

FOURTEENTH AMENDMENT.
Scope of, 298, 311.
As defining citizenship, 290, 291, 292.
As affecting right to vote, 293, 294.
Privileges and immunities of citizens of the United States, 298.
Due process of law, 273.
Equal protection of the laws, 312.

FOURTH AMENDMENT, 246.

FUGITIVES FROM JUSTICE.
State obligations as to, 193.
Jurisdiction as to issue of *habeas corpus* in cases of, 194.

FULL FAITH AND CREDIT.
To statutes, records and judgments of other states, 280.

GRAND JURY. See INFORMATION.

GRANTS.
As contracts, 160.

The references are to the pages.

HABEAS CORPUS.

In cases of fugitives from justice, 194.
In cases of restraint of liberty in violation of the Constitution, 225.
In cases of restraint for acts done in pursuance of federal authority, 214.

HARBOUR REGULATIONS.

By states, 78.

HEALTH LAWS.

Established by states, 80.

IMMIGRANTS.

Admission of, 296.

IMMUNITIES OF CITIZENSHIP. See CITIZENS.

IMPAIRMENT OF CONTRACTS. See CONTRACTS.

IMPEACHMENTS.

Jurisdiction in, 243.

IMPLIED POWERS.

Defined, 3.
Necessity of, 15.
Grant of, 16.
Illustrations of, 17.

IMPLIED RESTRAINTS.

On states, 4, 6, 44.

IMPORTS.

State taxation of, 43, 87.
State prohibition of sale of, 100.
Federal taxation of, 66.
Federal prohibition of, 66.
Term not applicable to interstate commerce, 87.
"Imports" into Porto Rico from United States, 12, 27, 28, 37.
"Imports" into United States from Porto Rico, 12, 13, 37.

IMPOSTS.

State imposition of, 43.

IMPROVEMENTS OF NAVIGATION.

Federal power over, 85.

INCOME TAX, 30.

The references are to the pages.

INDIAN TRIBES.
Not states, 135, 213.
Regulation of commerce with, 135.
Their exercise of powers not restrained by V Amendment, 247.

INDICTMENT.
After submission to grand jury amendable only on resubmission, 247.

INFORMATION, PROSECUTION UPON.
In federal trials, 12, 247.
In state trials, 274, 320.

INSOLVENT LAWS.
Effect of state, 150.

INSPECTION LAWS.
State, 44, 89, 91, 280, 321.
Federal, 251.

INSURANCE.
State regulation of contracts of, 63.
State regulation of suits against insurance companies, 318, 319, 320.

INTERSTATE COMMERCE ACT, 106.

INTOXICANTS. See LIQUOR LAWS.

JEOPARDY.
Putting twice in, 251.

"JIM CROW" LEGISLATION, 98, 317, 322.

JUDGES.
Tenure of office of federal, 196.
Compensation of federal, not diminishable during continuance in office, 197.
Character of federal judiciary, 230.

JUDICIAL POWER.
Necessity of federal, 203.
Constitutional provisions as to federal, 196.
Courts of the United States, 219.
Federal jurisdiction, 214.
Exclusive federal jurisdiction, 217.
Concurrent federal jurisdiction, 217, 268.
Original jurisdiction of federal courts, 216, 220.
Appellate jurisdiction of federal courts, 223.
Removal of causes, 224, 227.

The references are to the pages.

JUDICIAL POWER—*Continued.*

In cases in law and equity under the Constitution, 205.
Jurisdiction dependent on character of parties. See ACTIONS.
Jurisdiction as to political questions, 228, 231.
Jurisdiction in *habeas corpus.* See HABEAS CORPUS.
Jurisdiction in admiralty, 206, 243, 269.
Courts martial, 243.
Military commissions, 243, 246, 249.
Impeachments, 243, 244.
Construction of Constitution and statutes, 232, 233.
Limitation of, by Amendments. See AMENDMENTS.
Law administered in federal courts, 239.
Relations between federal and state courts, 265.
Judicial power of the states as affected by the "full faith and credit" clause, 280.

JUDICIAL SYSTEM.

Theory of, under common law, 199.

JUDGMENTS.

As contracts, 153.
Effect of, in other states, 280.
Scope of, of courts, 237.

JURISDICTION.

Conflict of, between state and federal courts, 265.
Of federal courts. See JUDICIAL POWER.

JURY.

Trial by, not to be taken away by federal government, 246, 249, 250, 253, 255.
Waiver of trial by, for minor offenses, 246, 254.
Trial in state courts, 274, 320.
Discriminations forbidden in state regulation of jury service, 295, 312.

JUST COMPENSATION.

For private property taken for public use, 253, 277, 278.

LANDS.

Public, state taxation of, 45, 46.

LAW OF THE LAND, 4, 248.

LEGAL TENDER.

Power of Congress over, 20.

The references are to the pages.

LIBERTY.

Religious, 309.
Of speech, 309.
Deprivation of, without due process of law, 247, 250, 251, 280, 297.

LIFE, LIBERTY AND PROPERTY. See Due Process of Law.

LIMITATIONS, STATUTES OF.

As impairing contracts, 143.
As denying due process of law, 275, 279.

LIQUOR LAWS.

License legislation, 317, 321.
Local option, 275, 317.
Prohibition, 100, 278.
Original package doctrine, 91, 93.
Inspection, 90.
Taxation, 92.

LOTTERIES.

Federal legislation, 64.
State legislation, 178, 320.

MILITARY COMMISSIONS, 243.

MONEY. See Bills of Credit, Legal Tender.

MONOPOLIES.

Federal legislation, 120.
State grants of, 168, 169, 175, 178, 310, 314.
State restriction of, 313.

NATIONAL BANKS.

Power of Congress to create, 17.
State taxation of, 48.
Federal taxation of, 17, 23.

NATURALIZATION.

Regulation of, by United States, 291.
State courts may admit to citizenship under acts of Congress, 218, 291.

NAVIGABLE WATERS.

Defined, 209.
Title to land under, 71.
Improvements of, 85.

The references are to the pages.

NAVIGATION.

Regulation of, by United States, 77.
Regulation of, by states, 77.
Improvements of, 85.

NEGROES. See Coloured Persons.

ORDINANCE OF 1787.

Effect of, on regulation of commerce, 84.

ORIGINAL JURISDICTION.

Of federal courts, 216, 220.

ORIGINAL PACKAGE.

Doctrine, 93.
Taxation of goods in, see also 88.

PAINS AND PENALTIES.

Prohibition of bills of, 182, 188.
Definition of bills of, 188.

PATENTS.

Granted by United States do not exempt from state taxation, 47.
Granted by United States do not exempt from state police regulation, 70.
Exclusive license to use, does not violate Anti-trust law, 123.
Jurisdiction of state courts in patent cases, 269.

PERSON, RIGHTS OF. See Rights of Person.

PHILIPPINES. See Territories.

PIERS.

Regulation of, 87.

PILOTAGE.

Regulation of, 76.

POLICE POWER.

Definition of, 323.
Of the United States, 323.
Of the states, 323.

POLICE REGULATION.

As affecting commerce, 97.
Exemption by contract from, 176.

The references are to the pages.

PORT DUES.
Imposition of, by states, 75.

PORTO RICO.
Taxation, 12, 13, 27, 28, 37, 73.
Immigration from, 298.

PORT REGULATIONS.
Established by states, 78.

PORTS, PREFERENCES OF, 73.

PREAMBLE OF THE CONSTITUTION.
Force and effect of, 6.

PRIVILEGES AND IMMUNITIES.
Of citizens of the United States, 298.
Of citizens of one state within another state, 300.

PROCESS OF LAW. See Due Process of Law.

PUBLIC LANDS.
State taxation of, 45, 46.

QUARANTINE REGULATIONS, 80.

RAILWAYS.
Federal regulation of interstate transportation by, 106.
State regulation of interstate transportation by, 97.
State police regulation of, 97.
State taxation of, 102.
Tolls for use of improved facilities for transportation, 102.

RAILWAY RATES, STATE REGULATION OF.
As limited by commerce clause, 98, 101, 101a.
As limited by contract, 164, 177, 178.
As limited by requirement of due process of law, 101a, 278.
As limited by requirement of equal protection of the laws, 101a, 313, 315, 321.

RAILWAY STATIONS.
State regulations concerning, 99, 100, 101.

RATIFICATION OF CONSTITUTION.
Effect of, 1.

RECORDS.
Proof of, in other states, 280.

The references are to the pages.

REGULATION.
Of commerce. See COMMERCE.
Of remedy. See CONTRACTS.

RELATION BETWEEN THE GOVERNMENTS, 1.

RELATION BETWEEN FEDERAL AND STATE COURTS, 265.

RELIGION.
Establishment of, 309.

REMEDY, REGULATION OF. See CONTRACTS.

REMOVAL OF CAUSES, 224, 227.

REPUBLICAN FORM OF GOVERNMENT.
Guaranteed to the states, 327.

RESERVED POWERS AND RIGHTS.
Of the states, 2, 325, 326.

RESTRAINTS UPON STATES, 4.

RETROSPECTIVE LAWS.
Not prohibited, 182, 183.

RIGHTS OF PERSON AND OF PROPERTY.
State control over, 298.
As protected by V Amendment, 247.
As protected by XIV Amendment, 273, 311, 312.

RULES OF CONSTRUCTION.
Of Constitution and statutes, 232, 233.

SEARCHES AND SEIZURES.
Unreasonable, by federal officers, prohibited, 246.

SECESSION.
Unconstitutionality of, 1.

SELF-GOVERNMENT.
Reservation to the states of right of, in local matters, 329.

SEVENTH AMENDMENT, 255.

SHIPPING.
Regulation of, by United States, 77.
Regulation of, by states, 77.
State taxation of, 57, 106.

SIXTH AMENDMENT, 253.

The references are to the pages.

SLAVERY.
Abolished by XIII Amendment, 310.

STATES, THE.
Existence of, before the Constitution, 2.
Independent of each other, so far as not controlled by Constitution, 2.
Powers and obligations of new, 2.
Restraints upon, 4.
Taxation by, 40.
Suits against, as affected by contracts, 180.
Suits against, as affected by XI Amendment, 214, 258.
Judicial power of, as affected by the federal supremacy, 232, 265.
Judicial power of, as affected by the grant of judicial power to the United States, 270.
Judicial power of, as affected by the XIV Amendment, 273.
Reserved rights of, 2, 325, 326.
Necessity for maintenance of rights of, 329.

STATE AGENCIES.
Federal taxation of, 39.

STATE BANKS.
Federal taxation of, 17, 40.

STATE COURTS. See JUDICIAL POWER.

SUITS. See ACTIONS, JUDICIAL POWER.

SUPREMACY OF THE UNITED STATES.
State taxation affected by the, 44.
State regulation of federal judicial process or practice, 265.
Supremacy of the Constitution, 3, 232.
Supremacy of the laws of the United States, 3, 233.
Supremacy of the treaties of the United States, 3, 238.
Results of the, 325.

SUPREME COURT.
Jurisdiction of, 219.
Constitution of, 220.
Appeals to, 226.
See also JUDICIAL POWER.

TAXATION.
Defined, 22.
Power of, in whom vested, 22.
Charges which are not taxes, 23, 39.
Not to be imposed for private purposes, 24.

The references are to the pages.

TAXATION, FEDERAL.

Constitutional provisions as to, 25.
Restrictions upon, 26.
Uniformity of, 35.
Direct, 30.
Of imports and exports, 28, 29, 87.
In the territories, 12, 26, 27, 28, 37.
Of state agencies, 39.

TAXATION, STATE.

General power of, 40.
Illustrations of power of, 40, 41.
Expressed restraints on, 43.
Implied restraints on, 44.
Of federal agencies, 44.
Of national banks, 48.
Of imports, 88.
Of goods from other states, 43, 90.
Of persons and property beyond its territory, 41, 42.
As affected by contracts of exemption, 52.
As a regulation of commerce, 54.
Denial of due process of law in, 277.
Denial of equal protection of the laws in, 41, 316, 317, 320, 321.

TELEGRAPHS.

Regulation of, 133.
State taxation of, 40, 134.

TERRITORIES.

Congressional power over, 7.
Taxation in, 12, 26, 27, 28, 37, 73.
Trial by jury in, 10, 12.

THIRTEENTH AMENDMENT.

Slavery and involuntary servitude prohibited by, 310.

TITLES OF NOBILITY.

Not to be granted by the states, 327.

TONNAGE.

Defined, 74.
State duties upon, 43, 44, 74.

TRADE-MARKS.

Federal regulation of, 63.

The references are to the pages.

TRANSIT.
Right of, not limitable by state taxation, 47, 104.

TRANSPORTATION. See RAILWAYS, SHIPPING.

TREATIES.
Supremacy of, 238.

TRIAL BY JURY. See JURY.

TRIBES. See INDIAN TRIBES.

TRUSTS.
Necessity of, 114.
Anti-trust law, 120.

TWICE IN JEOPARDY, 251.

UNIFORMITY. See CLASSIFICATION.

UNION.
Indissolubility of, 1.

UNITED STATES.
Limited powers of, 2.
Supremacy of, 3, 325.

VOTERS. See CITIZENS.

WARRANTS.
Requisites to issue of search, 246.

WATER-WAYS. See NAVIGABLE WATERS.

WHARVES.
State regulation of, 83, 87.

WITNESSES.
Right of accused to be confronted with, 254.
Right of accused to have compulsory process for obtaining, 254.

LIBRARY OF CONGRESS
0 012 052 187 1